

















REPORTS OF CASES  
DECIDED IN THE  
COURT OF APPEAL,

DURING PARTS OF THE YEARS 1887 AND 1888.

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JUDGES  
OF THE  
COURT OF APPEAL  
DURING THE PERIOD OF THESE REPORTS.

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THE HON. JOHN HAWKINS HAGARTY, C. J. O.  
“ “ GEORGE WILLIAM BURTON, J. A.  
“ “ CHRISTOPHER SALMON PATTERSON, J. A.  
“ “ FEATHERSTON OSLER, J. A.  
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# A TABLE

OF THE

## CASES REPORTED IN THIS VOLUME.

| B.  |     | D.   |     |
|---|-----|--|-----|
| Bate v. The Canadian Pacific R. W. Co .....   | 388 | Derinzy v. The Corporation of Ottawa .....               | 712 |
| Baxter, St. Denis v .....   | 387 | Dixon v. The Richelieu Navigation Co.....                | 647 |
| Bowerman v. Phillips .....  | 679 | Dominion Savings and Investment Society, The, v. Kilroy. | 487 |
| Brantford, The Corporation of the City of, v. The Ontario Investment Co .....               | 605 | Donovan v. Hogan.....                                    | 432 |
| Broddy et al., Coyne v .....  | 159 | Dun, Wiman & Co., and Chapman, Todd v .....              | 85  |
| Brown v. Howland .....  | 750 | Dunkin v. Cockburn .....                                 | 493 |
| Bull v. The North British Canadian Investment Co., and the Imperial Fire Insurance Co ..... | 421 | Dunn, Jordan v .....                                     | 744 |
|   |     | Drummond, Hunter v .....                                 | 232 |
|   |     | Durrell, The Bank of Hamilton and .....                  | 500 |
| C.  |     | E.   |     |
| Canadian Pacific R. W. Co., The, Bate v .....   | 388 | Edgar v. The Central Bank ..                             | 193 |
| Central Bank, The, Edgar v ..   | 193 | Embury v. West.....                                      | 357 |
| Chishome, Smith v .....   | 738 |  |     |
| Clarkson v. The Ontario Bank  | 166 |  |     |
| Clarkson v. Sterling .....  | 234 |  |     |
| Clayton v. McConnell .....  | 560 |  |     |
| Coats v. Kelly .....  | 81  |  |     |
| Cockburn, Dunkin v .....  | 493 |  |     |
| Connell v. Hickock .....  | 518 |  |     |
| Cooley, Ryan v .....  | 379 |  |     |
| Cox, Sutherland v .....   | 541 |  |     |
| Coyne v. Broddy et al .....   | 159 |  |     |
|   |     | F.   |     |
|   |     | Farquharson, Hall v .....                                | 457 |
|   |     | Freeman, Kennedy' v.....                                 | 216 |
|   |     | Follett v. The Toronto Street R. W. Co .....             | 346 |
|   |     |  |     |
|   |     | G.   |     |
|   |     | Grand Trunk R. W. Co., The, Hurd v .....                 | 58  |



|  |     |  |     |
|--|-----|--|-----|
| Grand Trunk R. W. Co., The,<br>McMillan v . . . . .          | 14  | Lake, O'Sullivan v . . . . .   | 711 |
| Grand Trunk R. W. Co., The,<br>Jennings v . . . . .          | 477 | Lindop, Wells v . . . . .  | 695 |
| Greenfield, St. Vincent v . . . .                            | 567 | London, Corporation of City of,<br>Regina v . . . . .  | 414 |
| Grough et al., Stuart v . . . . .                            | 299 | London, City of, Assurance Co.,<br>Mitchell v . . . . .  | 262 |
| H.   |     | London Mutual Insurance Co.,<br>The v. The City of London .  | 629 |
| Hall v. Farquharson . . . . .                                | 457 | London, The City of, The Lon-<br>don Mutual Insurance Co. v. .   | 629 |
| Hamilton, The Bank of, and<br>Durrell . . . . .              | 500 | Lucas, The Merchants' Bank v. .  | 573 |
| Harris Manufacturing Co., The,<br>Piper v . . . . .          | 642 | Lucas, Superior Loan and Sav-<br>ings Co. v . . . . .  | 748 |
| Hickock, Connell v . . . . .                                 | 518 | M.   |     |
| Hislop v. The Township of<br>McGillivray . . . . .           | 687 | Macdougall, In re . . . . .  | 150 |
| Hogan, Donovan v . . . . .                                   | 432 | Mead v. O'Keefe . . . . .  | 103 |
| Howland, Brown v . . . . .                                   | 750 | Merchants Bank, The, v. Lucas  | 573 |
| Hunter v. Drummond . . . . .                                 | 232 | Mitchell v. City of London As-<br>surance Co . . . . .   | 262 |
| Hurd v. The Grand Trunk R.<br>W. Co . . . . .                | 58  | Molsons Bank, The, v. McMee-<br>kin, Ex parte Sloan . . . . .  | 535 |
| I.   |     | Mc.  |     |
| Imperial Fire Insurance Co.,<br>The, Bull v . . . . .        | 421 | McConnell, Clayton v . . . . .   | 560 |
| J.   |     | McDermid v. McDermid . . . .   | 287 |
| James v. The Ontario and<br>Quebec R. W. Co . . . . .        | 1   | McGillivray, The Township of,<br>Hislop v . . . . .  | 687 |
| Jennings v. The Grand Trunk<br>R. W. Co . . . . .            | 477 | McMeekin, Ex parte Sloan, The<br>Molsons Bank v . . . . .  | 535 |
| Jordan v. Dunn . . . . .                                     | 744 | McMillan v. The Grand Trunk<br>R. W. Co . . . . .  | 14  |
| K.   |     | McPherson v. Wilson . . . . .  | 294 |
| Kelly, Coats v . . . . .                                     | 81  | N.   |     |
| Kennedy v. Freeman . . . . .                                 | 216 | Nichol, Purdom v . . . . .   | 244 |
| Kilroy, The Dominion Savings<br>and Investment Society v . . | 487 | North British Canadian Invest-<br>ment Co., The, Bull v . . . .  | 421 |
| Kloepfer, Warnock v . . . . .                                | 324 | Nottawasaga Public School<br>Trustees of Section No. 9.,<br>The, v. The Corporation of<br>the Township of Nottawa-<br>saga . . . . . | 310 |
| L.   |     |  |     |
| Laird, Sheard v . . . . .                                    | 339 |  |     |

Nottawassaga, The Township  
of, Public School Trustees of  
v ..... 310

## O.

O'Keefe, Mead v. .... 103  
O'Meara v. The City of Ottawa 75  
Ontario Bank, The, Clarkson v 166  
Ontario Bank, The, Sader-  
quist v. .... 609  
Ontario Investment Co., The,  
The Corporation of the City  
of Brantford v. .... 605  
Ontario and Quebec R. W. Co.,  
The, James v. .... 1  
O'Sullivan v. Lake. .... 711  
Ostrom and the Corporation of  
the Township of Sidney, In  
re ..... 372  
Ottawa, The Corporation of,  
Derinzy v. .... 712  
Ottawa, The City of, O'Meara  
v. .... 75

## P.

Page, The Sun Life Assurance  
Co. v. .... 704  
Patterson, Peterborough Real  
Estate Co. v. .... 751  
Peck et al., Powell v. .... 138  
Peterborough, The Corporation  
of the County of, The Cor-  
poration of the County of  
Victoria v. .... 617  
Peterborough Real Estate Co.  
v. Patterson. .... 751  
Phillips, Bowerman v. .... 679  
Piper v. The Harris Manu-  
facturing Co. .... 642  
Powell v. Peck et al. .... 138  
Purdom v. Nichol ..... 244

## R.

Rainy Lake Lumber Co., In re  
v. The Union Bank of Lower  
Canada ..... 749  
Reddick v. The Saugeen Mutual  
Fire Ins. Co. .... 363  
Regina v. The Corporation of  
the City of London ..... 414  
Richelieu Navigation Co., The,  
Dixon v. .... 647  
Ryan v. Cooley ..... 379

## S.

Saderquist v. The Ontario Bank 609  
Saugeen Mutual Fire Ins. Co.,  
The, Reddick v. .... 363  
Sheard v. Laird ..... 339  
Sidney, Corporation of, and  
Ostrom, In re ..... 372  
Smith v. Chishome. .... 738  
Steele v. York. .... 666  
St. Denis v. Baxter ..... 389  
Sterling, Clarkson v. .... 234  
Stuart v. Grough et al. .... 299  
St. Vincent v. Greenfield .... 567  
Sun Life Assurance Co., The v.  
Page. .... 704  
Superior Loan and Savings Co.  
v. Lucas ..... 748  
Sutherland v. Cox ..... 541

## T.

Todd v. Dun, Wiman & Co.,  
and Chapman ..... 85  
Toronto Street R. W. Co., The,  
Follett v. .... 346  
Toronto, The Corporation of  
the City of v. The Toronto  
Street R. W. Co. .... 30  
Toronto Street R. W. Co., The,  
The Corporation of the City  
of Toronto v. .... 30

## U.

|  |     |
|--|-----|
| Union Bank of Lower Canada,<br>The, In re Rainy Lake Lum-<br>ber Co. v ..... | 749 |
|--|-----|

## V.

|  |     |
|--|-----|
| Victoria, The Corporation of<br>the County of v. The Corpor-<br>ation of the County of Peter-<br>borough ..... | 617 |
|--|-----|

## W.

|                           |     |
|---------------------------|-----|
| Warnock v. Klœpfer .....  | 324 |
| Wells v. Lindop .....     | 695 |
| West, Embury v .....      | 357 |
| Wilson, McPherson v ..... | 294 |

## Y.

|                      |     |
|----------------------|-----|
| York, Steele v ..... | 666 |
|----------------------|-----|

---



# A TABLE

## OF THE

### CASES CITED IN THIS VOLUME.

---

#### A.

| NAMES OF CASES CITED.                                 | WHERE REPORTED.                     | Page of Vol. |
|---|-------------------------------------|--------------|
| Abraham v. Reynolds .....                             | 5 H. & N. 143 .....                 | 485          |
| Adamson, Ex parte .....                               | 8 Ch. D. 817 .....                  | 601          |
| Adkin v. Friend .....                                 | 38 L. T. N. S. 563 .....            | 321          |
| Alderson v. Maddison .....                            | 8 App. Cas. 473 .....               | 601          |
| Aldrich v. Cooper .....                               | 2 W. & T. L. C. 82 .....            | 249          |
| Alexander v. Mills .....                              | L. R. 6 Ch. 124, 131 .....          | 740          |
| —— v. Milwaukee .....                                 | 16 Wis. 264 .....                   | 728          |
| —— v. Pierce .....                                    | 10 N. H. 494 .....                  | 645          |
| —— v. The Toronto and Nipissing<br>R. W. Co. ....     | 33 U. C. R. 474, 35 U. C. R. 453 .. | 483          |
| Allen v. The North Metropolitan Tram-<br>way Co ..... | IV. Times Law Rep. 561 .....        | 353          |
| Ames v. Birkenhead Dock Co .....                      | 20 Beav. 332 .....                  | 299          |
| Anderson v. Muskoka Mill and Lumber<br>Co .....       | 27 C. P. 180 .....                  | 497          |
| Anglo Italian Bank v. Davies .....                    | 9 Ch. D. 275, .....                 | 304          |
| Arkwright v. Newbold .....                            | 17 Ch. D. 320 .....                 | 602          |
| Ashley v. Port Huron .....                            | 35 Mich. Rep. ....                  | 733          |
| Auger v. Ontario. Simcoe and Huron R.<br>W. Co. ....  | 9 C. P. 165 .....                   | 58           |
| Austin v. Boys .....                                  | 2 DeG. & J. 629 .....               | 114          |
| —— v. Gibson .....                                    | 4 A. R. 316 .....                   | 249          |
| —— v. Great Western R. W. Co. ....                    | L. R. 2 Q. B. 442 .....             | 484          |
| Australasia, The Bank of, v. Harris ...               | 15 Moo. P. C. 97 .....              | 223          |
| Aykrod, Re .....                                      | 1 Ex. 479 .....                     | 318          |

#### B.

|   |                                    |     |
|---|------------------------------------|-----|
| Backhouse v. Wells .....                | Fortescue 133 .....                | 759 |
| Badenach v. Slater .....                | 8 A. R. 402, 10 S. C. R. 296 ..... | 212 |
| Bagot, Lord v. Williams .....           | 3 B. & C. 235 .....                | 317 |
| Bailey v. Griffith .....                | 40 U. C. R. 418 .....              | 249 |
| Baker v. Saltfleet .....                | 31 U. C. R. 386 .....              | 372 |
| Ballagh v. Royal Mutual Fire Ins. Co .. | 5 A. R. 87, 101 .....              | 637 |
| Bandon, Lord v. Becher .....            | 3 Cl. & F. 510 .....               | 267 |
| Banner v. Berridge .....                | 18 Ch. D. 254 .....                | 161 |
| Barber v. McPherson .....               | 13 A. R. 356 .....                 | 357 |
| Barry v. Crosky .....                   | 2 J. & H. 23 .....                 | 602 |
| Beavan v. Wheat .....                   | 14 C. P. 51 .....                  | 684 |
| Beckett v. Grand Trunk R. W. Co .....   | 13 A. R. 174 .....                 | 486 |
| —— v. Johnston .....                    | 32 C. P. 300, 322 .....            | 451 |
| Belk v. Slack .....                     | 1 Kee. 238 .....                   | 380 |

| NAMES OF CASES CITED.   | WHERE REPORTED.                       | Page of Vol. |
|---|---------------------------------------|--------------|
| Bennet v. Batchelor .....   | 3 B. C. C. 29; 1 Jarm. 719 .....      | 326          |
| Bergheim v. The Great Eastern R. W. Co.                                 | 3 C. P. D. 221 .....                  | 389, 661     |
| Berlin, Municipality of v. Grange .....                                 | 5 C. P. 211; 1 E. & A. 279 .....      | 454          |
| Betts v. Williamsburgh .....  | 15 Barb. 255 .....                    | 2            |
| Bird v. Peagram .....   | 13 C. B. 639 .....                    | 528          |
| Biffin v. Bignett .....   | 7 H. & N. 877 .....                   | 645          |
| Birdsale v. Asphodel .....  | 45 U. C. R. 149 .....                 | 375          |
| Black v. Harrington .....   | 12 Gr. 175 .....                      | 452          |
| Blackmore v. Toronto Street R. W. Co.                                   | 38 U. C. R. 172 .....                 | 484          |
| Blanchard v. Russell .....  | 13 Mass. 112 .....                    | 195          |
| Bolland, Ex parte .....   | L. R. 17 Eq. 115 .....                | 534          |
| Bonsey v. Woodsworth .....  | 18 C. B. 325 .....                    | 319          |
| Bowker v. Burdekin .....  | 11 M. & W. 146 .....                  | 708          |
| Boyd, Re .....  | 15 L. R. Ir. 321 (1885) .....         | 230          |
| Boyes v. Cook .....   | 14 Ch. D. 53 .....                    | 742          |
| Boynton v. Shirley R. W. Co .....                                       | 4 Cush. 469 .....                     | 2            |
| Brant v. Waterloo .....   | 19 U. C. R. 450 .....                 | 617          |
| Brazier v. Polytechnic Institution .....                                | 1 F. & F. 507 .....                   | 392          |
| Brierly v. Kendall .....  | 17 Q. B. 937 .....                    | 644          |
| Bristol and Exeter R. W. Co. v. Collins.                                | 7 H. L. Cas. 194 .....                | 17           |
| Bristol Poor, Governor of v. Wait .....                                 | 1 A. & E. 280 .....                   | 630          |
| British Plate Manufacturers, Governor &<br>Co. of the v. Meredith ..... | 4 T. R. 794 .....                     | 728          |
| Broadbent v. Imperial Gas Co. ....                                      | 7 DeG. M. & G. 436 .....              | 722          |
| Broadhurst v. Morris .....  | 2 B. & Ad. 1 .....                    | 759          |
| Bronsdon v. Humphreys .....   | 14 Q. B. D. 141 .....                 | 317          |
| Brooke v. Hook .....  | L. R. 6 Ex. 89 .....                  | 577          |
| Brooklyn Co. v. City of Brooklyn .....                                  | 44 S. C. N. Y. 413 .....              | 37           |
| Brown v. Corporation of Sarnia .....                                    | 11 U. C. R. 89 .....                  | 716          |
| Browne v. Lord Kenyon .....   | 3 Madd. 410 .....                     | 380          |
| Brunswick Saving Co. v. Commercial<br>Union Ins. Co. ....               | 68 Me. 313 .....                      | 274          |
| Brush v. Ætna Ins. Co. ....   | 1 Oldright 459 .....                  | 269          |
| Buck v. Capstick, ... ..  | 12 Ch. D. 863 .....                   | 112          |
| Building and Loan Association v. Palmer.                                | 12 O. R. 1 .....                      | 235          |
| Burke v. South Eastern R. W. Co. ....                                   | 5 C. P. D. 1; 41 L. T. N. S. 554, 400 |              |
| Burland v. Moffatt .....  | 11 S. C. R. 76 .....                  | 188          |
| Burns v. McKay .....  | 10 O. R. 167 .....                    | 84, 235      |
| Burton, Ex parte .....  | 13 Ch. D. 102 .....                   | 237          |
| Butcher v. Pooler .....   | 24 Ch. D. 273 .....                   | 289          |
| Butler v. The Standard Ins. Co. ....                                    | 26 Gr. 341; 4 A. R. 391 .....         | 365          |
| Byng v. Byng .....  | 10 H. L. Cas. 171 .....               | 755          |

## C.

|  |                              |     |
|--|------------------------------|-----|
| Calder Navigation Co. v. Pilling .....           | 14 M. & W. 86 .....          | 38  |
| Caldwell v. Stadacona Ins. Co .....              | 11 S. C. R. 212 .....        | 269 |
| Cameron v. Campbell .....                        | 27 Gr. 307 .....             | 161 |
| —— v. Smith .....                                | 2 B. & Ald. 305 .....        | 139 |
| Campbell v. Great Western R. W. Co. .            | 15 U. C. R. 498 (1857) ..... | 58  |
| —— v. Prescott .....                             | 15 Ves. Jr. 503 .....        | 326 |
| Canada Southern R. W. Co. v. Norvell.            | 41 U. C. R. 207 .....        | 2   |
| —— Permanent Building Society v.<br>Taylor ..... | 31 C. P. 41 .....            | 499 |
| Canadian Bank of Commerce v. Green .             | 45 U. C. R. 1 .....          | 249 |
| Capel v. Jones .....                             | 4 C. B. 259 .....            | 88  |
| Capital and Counties Bank v. Henty ....          | 7 App. Cas. 741 .....        | 89  |
| Carne v. Brice .....                             | 7 M. & W. 133 .....          | 528 |
| Carr v. London and North Western R.<br>W. Co ..  | L. R. 10 C. P. 316 .....     | 601 |

| NAMES OF CASES CITED.                    | WHERE REPORTED.                                      | Page of Vol.  |
|--|--|---------------|
| Carradice v. Currie .....                | 12 Gr. 108 .....                                     | 326           |
| Charlton v. Watson .....                 | 4 O. R. 489 .....                                    | 472           |
| Chishom v. Provincial Ins. Co. ....      | 20 C. P. 11 .....                                    | 274           |
| Church v. Fenton .....                   | 28 C. P. 204 .....                                   | 432           |
| Citizens Bank v. First National Bank ..  | L. R. 6 H. L. 360 .....                              | 601           |
| —— Insurance Co. v. Parsons .....        | 7 App. Cas. 96 .....                                 | 189           |
| Clark v. Molyneux .....                  | 3 Q. B. D. 237 .....                                 | 93, 696       |
| —— v. Scottish Imperial Ins. Co. ....    | 4 S. C. R. 194 .....                                 | 428           |
| Clarkson v. Ontario Bank, &c. ....       | 15 A. R. 166 .....                                   | 194, 228, 242 |
| —— v. Sterling .....                     | 15 A. R. 234 .....                                   | 361           |
| Claxton v. Shibley .....                 | 10 O. R. 295 .....                                   | 432           |
| Clifford v. Koe .....                    | 5 App. Cas. 462 .....                                | 752           |
| Coghlan v. Ottawa .....                  | 1 A. R. 54 .....                                     | 721           |
| Cohen v. South Eastern R. W. Co. ....    | 2 Ex. Div. 253 .....                                 | 389, 661      |
| Colberry v. Lampen .....                 | 2 Ch. Cas. 155 .....                                 | 380           |
| Coldclugh (or Boyse) v. Rossborough....  | 3 Jur. N. S. 873, 6 H. L. Cas. 2..                   | 344           |
| Collins v. Bristol and Exeter R. W. Co.. | 11 Ex. 790, 1 H. & N. 517, 7 H. L.<br>Cas. 194 ..... | 21            |
| Commonwealth v. Clark .....              | 14 Gray 372 .....                                    | 532           |
| Continental Ins. Co. v. Cox .....        | 92 Ill. 145 .....                                    | 274           |
| Contois v. Bonfield .....                | 25 C. P. 39, 27 C. P. 84 .....                       | 498           |
| Cook v. Collingridge .....               | 27 Beav. 456 .....                                   | 114           |
| —— v. Fowler .....                       | L. R. 7 H. L. 27 .....                               | 141           |
| —— v. Grant .....                        | 32 C. P. 511 .....                                   | 160           |
| —— v. Rogers .....                       | 31 Mich. 391 .....                                   | 196           |
| Cooke v. Wildes .....                    | 5 Ell. & B. 341 .....                                | 93            |
| Cooper, Ex parte, Re Pennington .....    | 4 T. L. R. 643 .....                                 | 534           |
| —— v. Vesey .....                        | 20 Ch. D. 611 .....                                  | 289           |
| Cornill v. Hudson .....                  | 8 E. & B. 429 .....                                  | 169           |
| Cowan's Estate, Re .....                 | 18 Ch. D. 638 .....                                  | 299           |
| Coyne v. Lee .....                       | 14 A. R. 503 .....                                   | 532           |
| Crockett v. Crockett .....               | 2 Phil. 553 .....                                    | 755           |
| Croft v. Peterborough .....              | 5 C. P. 35, 141 .....                                | 720           |
| Crombie v. Jackson .....                 | 34 U. C. R. 575 .....                                | 195           |
| Cubitt v. Maxse .....                    | L. R. 8 C. P. 704 .....                              | 374           |
| Cumming v. Ince .....                    | 11 Q. B. D. 112 .....                                | 645           |
| Cushing v. Dupuy .....                   | 5 App. Cas. 409 .....                                | 175           |
| Czech v. General Steam Navigation Co.    | L. R. 3 C. P. 14 .....                               | 656           |

## D.

|   |                         |          |
|---|-------------------------|----------|
| D'Arc v. London and Northern R. W. Co.            | L. R. 9 C. P. 325 ..... | 649      |
| Davidson v. Boston, &c. R. W. Co. ....            | 3 Cush. 92 .....        | 2        |
| —— v. Douglass .....                              | 15 Gr. 347 .....        | 235      |
| —— Ross .....                                     | 24 Gr. 22 .....         | 225      |
| Davies v. Mann .....                              | 10 M. & W. 546 .....    | 348      |
| —— v. Snead .....                                 | L. R. 5 Q. B. 608 ..... | 96       |
| Davis v. The Bank of England .....                | 2 Bing. 393 .....       | 587, 610 |
| Dawkins v. Lord Paulet .....                      | L. R. 5 Q. B. 94 .....  | 92       |
| Degg v. Midland R. W. Co. ....                    | 1 H. & N. 781 .....     | 65       |
| Deverill v. Coe .....                             | 11 O. R. 222 .....      | 432, 462 |
| Dickson v. Dickson .....                          | 6 O. R. 278 .....       | 760      |
| —— v. McMahon .....                               | 14 C. P. 521 .....      | 684      |
| Dixon v. The Metropolitan Board of<br>Works ..... | 7 Q. B. D. 418 .....    | 737      |
| Dodd v. Wigley .....                              | 7 C. B. 106 (n) .....   | 319      |
| Dodds v. Shepherd .....                           | 1 Ex. D. 75 .....       | 512      |
| Doe Greenshields v. Garrow .....                  | 5 U. C. R. 237 .....    | 538      |
| Doe d. Hunt v. Moore .....                        | 14 East. 601 .....      | 380      |

| NAMES OF CASES CITED.                 | WHERE REPORTED.          | Page of Vol. |
|---------------------------------------|--------------------------|--------------|
| Dominion Bank v. Davidson .....       | 12 A. R. 90 .....        | 518          |
| Donovan v. Hovey .....                | .....                    | 450          |
| Dooby v. Watson .....                 | 39 Ch. D. 178 .....      | 165          |
| Doolan v. Midland R. W. Co .....      | App. Cas. 7921 .....     | 25           |
| Doupe v. Stewart .....                | 13 Gr. 637 .....         | 112          |
| Duff v. Canadian Mutual Ins. Co ..... | 6 A. R. 238 .....        | 637          |
| Duke, Re .....                        | 16 Ch. D. 112 .....      | 384          |
| Duncan v. Cashien .....               | L. R. 10 C. P. 554 ..... | 520          |
| Dundas v. Darvill .....               | 8 C. L. T. 51 .....      | 503          |
| Dungate, Re—Ex parte Chester .....    | 1 Ch. D. 293 .....       | 235          |
| Dungey v. The Mayor of London .....   | 38 L. J. C. P. 298 ..... | 728          |

## E.

|   |                                       |               |
|---|---------------------------------------|---------------|
| East India Interest .....               | 3 Bing. 193 .....                     | 156           |
| Ebersale v. Adams .....                 | 10 Bush. 83 .....                     | 195           |
| Eddy v. Herrin .....                    | 17 Me. 336 .....                      | 645           |
| Edgar v. Central Bank .....             | 15 A. R. 193 .....                    | 184, 218, 233 |
| Edgington v. Fitzmaurice .....          | 29 Ch. D. 459 .....                   | 602           |
| Edinburgh Life Ins. Co. Ferguson .....  | 32 U. C. R. 253 .....                 | 457           |
| Edmunson qui tam v. Davis .....         | 4 Esp. 14 .....                       | 153           |
| Edwards v. English .....                | 7 E. & B. 564 .....                   | 527           |
| ——— v. Hammond .....                    | 3 Lev. 132; 1 B. & P. N. R. 324 ..... | 380           |
| Eley v. The Positive Life Ins. Co. .... | 1 Ex. D. 88 .....                     | 282           |
| Elwood v. Bullock .....                 | 6 Q. B. 401 .....                     | 38            |
| Emanuel v. Bridger .....                | L. R. 9 Q. B. 286 .....               | 309, 327      |
| Emery v. The Provincial Ins. Co. ....   | 10 C. P. 20 .....                     | 283           |
| Empress Engineering Co., Re .....       | 16 Ch. D. 127 .....                   | 271           |
| Engelbach v. Nixon .....                | L. R. 10 C. P. 645 .....              | 534           |
| Ennis v. Harmony Ins. Co. ....          | 3 Bos. 519 .....                      | 269           |
| European Central R. W. Co., re The....  | 4 Ch. D. 33 .....                     | 146           |
| Evans, Ex parte .....                   | 11 Ch. D. 691; 13 Ch. D. 252 .....    | 306           |
| Ewart v. Ewart .....                    | 11 Hare 276 .....                     | 742           |

## F.

|   |   |          |
|---|---|----------|
| Farr v. Robins .....                                | 12 C. P. 25 .....                                       | 537      |
| Fenelon Falls v. Victoria R. W. Co. ....            | 29 Gr. 4 .....  | 567      |
| Fenwick v. Schmaltz .....                           | L. R. 3 C. P. 313 .....                                 | 329      |
| Ferguson v. Carman .....                            | 26 U. C. R. 26 .....                                    | 327      |
| ——— v. Freeman .....                                | 27 Gr. 211 .....  | 443      |
| Ferrar v. Commissioners of Sewers .....             | L. R. 4 Ex. 1 .....                                     | 724      |
| Ferris v. Kingston .....                            | 12 U. C. R. 436 .....                                   | 249      |
| Fewings, Ex parte .....                             | 25 Ch. D. 338 .....                                     | 148      |
| Fisher, Ex parte .....                              | L. R. 7 Ch. 636 .....                                   | 235, 360 |
| Fitzgerald v. Grand Trunk R. W. Co. ....            | 4 A. R. 601 .....                                       | 24, 647  |
| Flavell, In re .....                                | 25 Ch. D. 89 .....                                      | 271      |
| Fleming v. McNab .....                              | 8 A. R. 656, 667 .....                                  | 451      |
| ——— v. Manchester .....                             | 44 L. T. N. S. 517 .....                                | 735      |
| ——— v. Newton .....                                 | 1 H. L. Cas. 363 .....                                  | 101      |
| Fletcher v. Rylands .....                           | 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330 ..... | 721      |
| Foley v. Hill .....                                 | 2 H. L. C. 28 .....                                     | 161      |
| Ford v. London and South Western R. W. Co .....     | 2 F. & F. 730 .....                                     | 393      |
| Forfar v. Climie .....                              | 10 P. R. 90 .....                                       | 290      |
| Foster v. MacKinnon .....                           | .....   | 409      |
| Foulkes v. The Metropolitan District R. W. Co ..... | 5 C. P. D. 157 .....                                    | 484      |



| NAMES OF CASES CITED.   | WHERE REPORTED.              | Page of Vol. |
|---|------------------------------|--------------|
| Fountain v. Boodle.....                                       | 3 Q. B. 5 .....              | 92           |
| Fowler v. Vail.....   | 4 A. R. 275 .....            | 238          |
| Fox v. Fox .....  | 19 Eq. 286 .....             | 380          |
| Francis v. Cockrell.....                                      | L. R. 5 Q. B. 84 .....       | 676          |
| Frankford v. City of Philadelphia .....                       | 58 Penn. State Rep. 119..... | 36           |
| Franklin Savings Co. v. Central Fire Ins.<br>Co .....         | 119 Mass. 240 .....          | 274          |
| Freeman v. Cooke .....  | 2 Ex. 654 .....              | 578          |
| — v. Read .....   | 4 B. & S. 174 .....          | 376          |
| Fuggle v. Bland .....   | 11 Q. B. D. 711.....         | 304          |
| Fullarton v. Manchester South Junction,<br>&c., R. W. Co..... | 14 C. B. N. S. 54 .....      | 64           |
| Furber, Ex parte .....  | 17 Ch. D. 191.....           | 141          |

## G.

|  |   |          |
|--|---|----------|
| Gabell v. South Eastern R. W. Co.....                    | 36 L. T. N. S. 154 .....                              | 407      |
| Gallin v. The London and North Western<br>R. W. Co ..... | L. R. 10 Q. B. 212 .....                              | 483, 649 |
| Gandy v. Gandy.....                                      | 30 Ch. D. 57 .....                                    | 271      |
| Gardiner v. Juson .....                                  | 2 E. & A. 210 .....                                   | 539      |
| Geary v. The Gore Bank .....                             | 5 Gr. 336 .....                                       | 248      |
| Geddis v. The Bann Reservoir .....                       | H. L. (3 App. Cas. 430) .....                         | 735      |
| Gibbs v. Fremont .....                                   | 9 Ex. 25 .....  | 139      |
| Gilchrist v. Carden.....                                 | 26 C. P. 1 .....                                      | 572      |
| Girdlestone v. Brighton Aquarium Co. ....                | 4 Ex. D. 107.....                                     | 267      |
| Glass v. Cameron .....                                   | 9 O. R. 712 .....                                     | 679      |
| Goldstein v. Foss .....                                  | 6 B. & C. 154 .....                                   | 88       |
| Gordello v. Weguelin .....                               | 5 Ch. D. 287 .....                                    | 147      |
| Goring v. Insurance Co.....                              | 10 O. R. 236 .....                                    | 368      |
| Graham v. Tomlinson .....                                | 12 P. R. 367 .....                                    | 290      |
| Grant v. The Great Western R. W. Co..                    | 7 C. P. 438, S. C. in App. 5 U. C.<br>L. J. 210 ..... | 481      |
| Great Western R. W. Co. v. Baby ....                     | 13 U. C. R. 119 .....                                 | 2        |
| — v. Brown....   | 3 S. C. R. 159 .....                                  | 481      |
| — v. Bunch ....  | 13 App. Cas. 31.....                                  | 389      |
| — v. Rouse ....  | 15 U. C. R. 168.....                                  | 636      |
| Greet v. Citizen's Ins. Co.....                          | 27 Gr. 121, 5 A. R. 550 .....                         | 270      |
| Gregory v. Williams .....                                | 3 Mer. 582 .....                                      | 271      |
| Grill v. The General Iron Screw Colliery<br>Co .....     | L. R. 1 C. P. 600.....                                | 663      |
| Grosvenor v. Atlantic Ins. Co.....                       | 17 N. Y. 31 .....                                     | 274      |
| Grote v. Chester and Holyhead R. W. Co. ....             | 2 Ex. 251 .....                                       | 393      |

## H.

|   |                           |          |
|---|---------------------------|----------|
| Haisley v. Somers .....                               | 13 O. R. 605 .....        | 457      |
| Hale v. The Ins. Co. of North America..               | 58 N. Y. 272 .....        | 278      |
| Hall v. Barrows .....                                 | 4 DeG. J. & Sm. 152 ..... | 114      |
| — v. Gilmour .....                                    | 9 U. C. R. 492.....       | 249      |
| — v. Hall .....                                       | 2 E. & A. 569 .....       | 457      |
| — v. Hall.....  | 20 Beav. 139 .....        | 118      |
| Hallas v. Robinson .....                              | 15 Q. B. D. 288.....      | 526      |
| Hamilton, Bank of, v. Western Assur-<br>ance Co. .... | 38 U. C. R. 609.....      | 270      |
| Hamilton v. Eggleston .....                           | 22 C. P. 536 .....        | 451, 472 |
| — v. Royse .....                                      | 2 Sch. & Lef. 330.....    | 742      |
| Hampton v. Holman .....                               | 5 Ch. D. 183 .....        | 757      |
| Harmon v. Harmon .....                                | 61 Me. 227 .....          | 645      |

| NAMES OF CASES CITED                   | WHERE REPORTED.                  | Page of Vol. |
|--|----------------------------------|--------------|
| Harris v. Commercial Bank .....        | 16 U. C. R. 443 .....            | 521          |
| Harrison v. Grimwood .....             | 12 Beav. 192 .....               | 381          |
| —— v. Wright .....                     | 13 M. & W. 816 .....             | 513          |
| Hawkins v. Gathercole .....            | 1 Drew. 12 .....                 | 299          |
| —— v. Gathercole .....                 | 6 D. M. & G. 1 .....             | 328          |
| Hayes v. The Chicago, &c., R. W. Co. . | 17 Am. & Eng. R. W. Cases 112 .. | 2            |
| Hearne v. Stowell .....                | 12 A. & E. 719 .....             | 88           |
| Heaven v. Pender .....                 | 11 Q. B. D. 503-507 .....        | 69           |
| Henderson v. Stevenson .....           | L. R. 2 Sc. App. 470 .....       | 402          |
| Henwood v. Harrison .....              | L. R. 7 C. P. 628 .....          | 96           |
| Hirsch v. Coates .....                 | 18 C. B. 757 .....               | 334          |
| Hodge's Case .....                     | 9 App. Cas. 117, 128 .....       | 216          |
| Hodgins v. Bruce .....                 | 3 E. & A. 169 .....              | 728          |
| Holbird v. Anderson .....              | 5 T. R. 235 .....                | 206          |
| Holmes v. Tutton .....                 | 5 E. & B. 65 .....               | 305          |
| Hope v. Graves .....                   | 14 C. P. 393 .....               | 537          |
| Hue v. French .....                    | 3 Jur. N. S. 428 .....           | 215          |
| Huguenin v. Basely .....               | 2 Wh. & T. L. C. 636 .....       | 340          |
| Huron, Corporation of v. Armstrong ..  | 27 U. C. R. 533 .....            | 708          |
| Hutchison v. Collier .....             | 27 C. P. 249 .....               | 432          |

## I.

|  |                       |     |
|--|-----------------------|-----|
| Ingram v. Ingram .....                 | 2 Atk. 88 .....       | 742 |
| Ings v. The Bank of Prince Edward Isl. | 11 S. C. R. 265. .... | 83  |
| Irwin v. Bank of Montreal .....        | 38 U. C. R. 375 ..... | 481 |
| Izard, Ex parte .....                  | L. R. 9 Ch. 271 ..... | 237 |

## J.

|  |                        |          |
|--|------------------------|----------|
| Jacomb v. Henry .....                                      | 3 C. P. 377 .....      | 537      |
| Jacques v. Harrison .....                                  | 12 Q. B. D. 165 .....  | 538      |
| Jacques Cartier, La Banque v. L. Banque<br>D'Epargne ..... | 13 App. Cas. 118 ..... | 592      |
| Janson v. Reach .....                                      | 19 U. C. R. 591 .....  | 376      |
| Jeffrey v. Honeywood .....                                 | 4 Mad. 398 .....       | 759      |
| Jones v. Central R. W. Co. ....                            | 46 U. C. R. 230 .....  | 190      |
| Jordan v. Money .....                                      | 5 H. L. 185 .....      | 601      |
| Joselyne, Ex parte .....                                   | 8 Ch. D. 318 .....     | 309, 327 |
| Joseph v. Lyons .....                                      | 15 Q. B. D. 280, ..... | 526      |

## K.

|                                       |   |     |
|---------------------------------------|---|-----|
| Keene v. Keene .....                  | 3 C. B. N. S. 144 .....                                 | 144 |
| Kempt v. Parkyns .....                | 25 C. P. 536 .....                                      | 451 |
| Kennedy v. Freeman .....              | 15 A. R. 216 .....                                      | 337 |
| Kilner, Ex parte .....                | 13 Ch. D. 245 .....                                     | 237 |
| Kimpton v. Willey .....               | 9 C. B. 719, .....                                      | 319 |
| King, Ex parte .....                  | 2 Ch. D. 256 .....                                      | 237 |
| —— v. Greenhill .....                 | 6 M. & G. 59 .....                                      | 139 |
| —— v. King .....                      | 2 Ch. D. 256 .....                                      | 235 |
| Kingston's Case, Duchess of .....     | 2 Sm. L. C. 267 .....                                   | 601 |
| Kinney v. Dunman .....                | 2 R. & Ches. 19 ; Cart. S. C. Cas.<br>Vol. 2, 412 ..... | 195 |
| Kinsey v. Roche .....                 | 8 P. R. 515 .....                                       | 290 |
| Klein v. The Union Fire Ins. Co. .... | 3 O. R. 234 .....                                       | 363 |
| Knights v. Wiffen .....               | .....   | 601 |



## L.

| NAMES OF CASES CITED.                      | WHERE REPORTED.                           | Page of Vol. |
|--|---|--------------|
| Labatt v. Bixell .....                     | 28 Gr. 593 .....                          | 327          |
| Lafferty v. Stock .....                    | 3. C. P. 1 .....                          | 375          |
| —— v. Wentworth .....                      | 8 U. C. R. 232 .....                      | 375          |
| Lambe v. Bank of Toronto .....             | 12 App. Cas. 588 .....                    | 191          |
| Laplane v. Peterborough .....              | 5 O. R. 634 .....                         | 372          |
| Laughton v. Bishop of Sodor and Man..      | L. R. 4 P. C. 508 .....                   | 95           |
| Lawless v. Sullivan .....                  | 6 App. Cas. 373 .....                     | 636          |
| Lee v. Howis .....                         | 30 U. C. R. 292 .....                     | 539          |
| —— v. Page .....                           | 7 Jur. N. S. 768 .....                    | 112          |
| Leeming v. Woon .....                      | 7 A. R. 42 .....                          | 299          |
| Lemay v. Chamberlain .....                 | 10 O. R. 638 .....                        | 101          |
| Leprohon v. Ottawa .....                   | 40 U. C. R. 478 ; 2 A. R. 522 .....       | 636          |
| Levy v. Davis .....                        | 12 P. R. 93 .....                         | 503          |
| Lewis v. Great Western R. W. Co. ....      | 3 Q. B. D. 195 .....                      | 647          |
| Leys v. Macpherson .....                   | .....                                     | 522          |
| Lilly v. Elwin .....                       | 11 Q. B. 755 .....                        | 562          |
| Linthicum v. Fenley .....                  | 11 Bush. 131 .....                        | 195          |
| Liverpool Ins. Co. v. Gunther .....        | 116 U. S. R. 113 .....                    | 278          |
| Livingstone v. Western Assurance Co. .     | 14 Gr. 461 ; on appeal, 16 Gr. 9 .....    | 272          |
| London, Municipality of v. Great Western   | 17 U. C. R. 262 .....                     | 629          |
| Long v. Hancock .....                      | 12 S. C. R. 532 .....                     | 84, 230      |
| Longeway v. Mitchell .....                 | 17 Gr. 194 .....                          | 212, 507     |
| Lounds v. Grimwade .....                   | 59 L. T. N. S. 168 ; 39 Ch. D. 605, ..... | 340, 646     |
| Love v. L'Estrange .....                   | 5 Bro. P. C. 59 .....                     | 385          |
| Lucas' Case .....                          | 15 A. R. 575 .....                        | 610          |
| L'Union St. Jacques de Montreal v. Belisle | L. R. 6 P. C. 31 .....                    | 177, 195     |
| Lyttle v. Broddy .....                     | 10 O. R. 530 .....                        | 432          |

## Mc.

|  |  |          |
|--|--|----------|
| McBride v. York .....                                | 31 U. C. R. 355 .....                    | 626      |
| McCall v. Wolff .....                                | 13 S. C. R. 130 .....                    | 520      |
| McCann v. London and North Western<br>R. W. Co. .... | 31 L. J. Ex. 65 .....                    | 662      |
| McCarrall v. Watkins .....                           | 19 U. C. R. 246 .....                    | 634      |
| McCawley v. Furness R. W. Co. ....                   | L. R. 8 Q. B. 57 .....                   | 649      |
| McCrea v. Waterloo .....                             | 26 C. P. 431 .....                       | 377      |
| McDonald v. McCall .....                             | 12 A. R. 593 .....                       | 213      |
| McFadden v. Jenkyns .....                            | 1 Ph. 133 .....                          | 161      |
| McGarvey v. Strathroy .....                          | 10 A. R. 631 .....                       | 717      |
| McIntee v. McCulloch .....                           | 2 E. & A. 390 .....                      | 95       |
| McIntosh v. Vanderburgh .....                        | 8 U. C. R. 248 .....                     | 377      |
| McKay v. Cryslor .....                               | 3 S. C. R. 436, 472 .....                | 433, 472 |
| McKenzie v. British Linen Co. ....                   | 6 App. Cas. 93, 29 W. R. 477, 577, ..... | 616      |
| —— v. Ryan .....                                     | 6 P. R. 323 .....                        | 318      |
| McNab v. Peer .....                                  | 32 C. P. 546 .....                       | 326      |
| McQueen v. The Phoenix .....                         | 4 S. C. R. 660 .....                     | 269, 429 |

## M.

|  |                       |     |
|--|-----------------------|-----|
| Mace v. Frotenac .....                         | 42 U. C. R. 87 .....  | 376 |
| Macdonald v. Boice .....                       | 12 Gr. 48 .....       | 679 |
| —— v. Crombie .....                            | 11 S. C. R. 107 ..... | 685 |
| —— v. Hamilton and Port Dover<br>Road Co. .... | 3 C. P. 402 .....     | 673 |

| NAMES OF CASES CITED.   | WHERE REPORTED.                   | Page of Vol. |
|---|-----------------------------------|--------------|
| Macrow v. Great Western R. W. Co....                                      | L. R. 6 Q. B. 612 .....           | 653          |
| Maddison v. Alderson .....  | 8 App. Cas. 467 .....             | 586          |
| Magurn v. Magurn .....  | 11 A. R. 181 .....                | 267          |
| Malpas v. London and South Western R. W. Co. ....                         | L. R. 1 C. P. 336 .....           | 18           |
| Maltbie v. Hothkiss .....   | 3 Conn. 80 .....                  | 196          |
| Manchester R. W. Co. v. Brown.....  | 8 App. Cas. 703 .....             | 662          |
| Marks v. Feldman .....  | L. R. 5 Q. B. 275 .....           | 227          |
| Marshall v. Pitman .....  | 9 Bing. 595 .....                 | 630          |
| —— v. The York R. W. Co.....  | 11 C. B. 655 .....                | 484          |
| Martin v. Franklin.....   | 38 N. J. L. R. 140 .....          | 274          |
| Mason v. Agricultural Ins. Co .....                                       | 18 C. P. 19.....                  | 363          |
| —— v. The Grand Trunk R. W. Co..  | 37 U. C. R. 163 .....             | 28           |
| Masters v. The Madison County Mutual Ins. Co .....                        | 11 Barb. N. Y. S. C. 624 .....    | 425          |
| Maughan v. The Brooklyn R. W. Co ..                                       | 38 N. Y. App. 455 .....           | 356          |
| Maw v. King and Albion .....  | 8 A. R. 249 .....                 | 625          |
| Mayer v. Hellman .....  | 91 U. S. R. 496 .....             | 196          |
| Meakin v. Sampson .....   | 28 C. P. 360 .....                | 488          |
| Melhado v. Porto Alegre R. W. Co ....                                     | L. R. 9 C. P. 503 .....           | 282          |
| Mellersh v. Keen .....  | 27 Beav. 236 .....                | 112          |
| —— v. Keen .....  | 28 Beav. 453 .....                | 137          |
| Mercantile Bank, The Chartered v. The Netherlands Steam Navigation Co.... | 10 Q. B. D. 521.....              | 664          |
| Mercer v. Peterson.....   | L. R. 2 Ex. 304 .....             | 237          |
| Mersey Steel and Iron Co. v. Naylor....                                   | 9 Q. B. 648, 9 App. Cas. 434 .... | 561          |
| Midland R. W. Co. v. Ontario Rolling Mills Co .....                       | 10 A. R. 677, 14 O. R. 608 .....  | 560          |
| Migotti v. Colvill .....  | 4 C. P. D. 243.....               | 377          |
| Milissich v. Lloyds .....   | 36 L. T. N. S. 423.....           | 411          |
| Millership v. Brooks .....  | 5 H. & N. 799.....                | 708          |
| Mills Re, Mills v. Mills .....  | 34 Ch. D. 186.....                | 741          |
| Mitchell v. Vandusen .....  | 14 A. R. 517 .....                | 289          |
| Moffatt v. Burland.....   | 11 S. C. R. 76 .....              | 83           |
| Molson's Bank v. Girdlestone.....   | 44 U. C. R. 55 .....              | 249          |
| —— v. McMeekin .....  | 15 A. R. 535 .....                | 685          |
| Moon v. Durden.....   | 2 Ex. 41 .....                    | 238          |
| Morgan v. Jones .....   | 8 Ex. 620 .....                   | 140          |
| Motley v. Manufacturing Co.....   | 29 Maine 337.....                 | 269          |
| Moulton v. Haldimand.....   | 12 A. R. 503 .....                | 687          |
| Mounson v. Redshaw .....  | 1 Wins. Saund. 201 (n).....       | 145          |
| Mullholland v. Merriam .....  | 19 Gr. 288 .....                  | 271          |
| Mullens v. Miller .....   | 22 Ch. D. 194 .....               | 602          |
| Mulligan v. Cole.....   | L. R. 10 Q. B. 349.....           | 88           |
| Murdoch v. Windsor and Annapolis R. W. Co.....                            | 3 Cart. 368 .....                 | 180          |
| Murray v. McCallum.....   | 8 A. R. 275 .....                 | 489          |
| Muschamp v. Lancaster and Preston R. W. Co. ....                          | 8 M. & W. 421.....                | 18           |
| Muttlebury v. Stevens .....   | 13 O. R. 29 .....                 | 139          |
| Myles v. Brooklyn.. ..  | 32 N. Y. 489 .....                | 733          |

## N.

|                                |                      |          |
|--------------------------------|----------------------|----------|
| Newton v. Ontario Bank .....   | 15 Gr. 283 .....     | 326      |
| Nicholls v. Cummings .....     | 1 S. C. R. 395.....  | 455      |
| Nickle and Walkerton, Re ..... | 11 O. R. 433 .....   | 720      |
| Nickle v. Douglas .....        | 37 U. C. R. 63 ..... | 605, 631 |
| Norcutt v. Dodd.....           | Cr. Ph. 100 .....    | 333      |
| North of Scotland, Re .....    | 31 C. P. 558 .....   | 607      |

## O.

| NAMES OF CASES CITED.   | WHERE REPORTED.       | Page of Vol. |
|---|-----------------------|--------------|
| O'Donohoe, Re .....   | 23 Gr. 408 .....      | 326          |
| O'Donohoe v. Wilson .....   | 42 U. C. R. 329 ..... | 361          |
| Omnum Securities Co. v. The Canada<br>Fire and Marine Ins. Co. .... | 1 O. R. 494 .....     | 421          |
| O'Neill v. Carter .....   | 9 U. C. R. 254 .....  | 249          |
| Ontario Bank v. Kirby .....   | 16 C. P. 35 .....     | 535          |
| Ontario and Quebec R. W. Co. and Tay-<br>lor, re, .....             | 6 O. R. 345 .....     | 2            |
| Orchard v. Ætna Ins. Co. ....                                       | 5 C. P. 445 .....     | 283          |
| Osborne v. Rowlett .....  | 14 Ch. D. 774 .....   | 743          |

## P.

|                                       |                                |          |
|---------------------------------------|--------------------------------|----------|
| Page v. Cox .....                     | 10 Hare 163 .....              | 283      |
| Pardo v. Bingham .....                | L. R. 4 Ch. 735 .....          | 169      |
| Parker v. Gossage .....               | 2 C. M. & R. 617 .....         | 174      |
| —— v. Le Marchant .....               | 1 Y. & C. Ch. Cas. 290 .....   | 326      |
| —— v. South Eastern R. W. Co. ....    | 2 C. P. D. 416 .....           | 19, 400  |
| Parkes v. St. George .....            | 10 A. R. 476 .....             | 84, 212  |
| Patent Cotton Co. v. Wilson .....     | 47 L. J. C. P. N. S. 715 ..... | 610      |
| Pawsey v. Armstrong .....             | 18 Ch. D. 698 .....            | 112      |
| Pearson, Re .....                     | 3 Ch. D. 807 .....             | 534      |
| Pearson v. Dolman .....               | L. R. 3 Eq. 315 .....          | 384      |
| Peck v. Gurney .....                  | L. R. 6 H. L. 412 .....        | 602      |
| Peek v. Shields .....                 | 6 A. R. 642 .....              | 175      |
| Perdue v. Chinguaousy .....           | 25 U. C. R. 61 .....           | 716      |
| Phillips v. Clark .....               | 2 C. B. N. S. 164 .....        | 654      |
| Pickard v. Sears .....                | 6 A. & E. 469 .....            | 601      |
| Pickstock v. Lyster .....             | 3 M. & S. 371 .....            | 208      |
| Piggott v. Stratten .....             | 1 DeG. F. & J. 33 .....        | 586      |
| Pike v. Polytechnic Institution ..... | 1 F. & F. 712 .....            | 393      |
| Planch v. Colbourn .....              | 8 Bing. 14 .....               | 562      |
| Pope, In re .....                     | 17 Q. B. D. 743 .....          | 306      |
| Popple v. Sylvester .....             | 22 Ch. D. 98 .....             | 148      |
| Porteous v. Meyers .....              | 12 A. R. 85 .....              | 507      |
| —— v. Reynar .....                    | 57 L. T. N. S. 891 .....       | 189, 213 |
| Price v. Gt. Western R. W. Co. ....   | 16 M. & W. 244 .....           | 140      |
| Prole v. Soady .....                  | 2 Giff. 1 .....                | 586      |
| Prowse v. Glenny .....                | 13 C. P. 560 .....             | 572      |

## Q.

|                                 |                         |     |
|---------------------------------|-------------------------|-----|
| Quay v. Sculthorpe .....        | 16 Gr. 449 .....        | 249 |
| Queen, The v. Essex .....       | 17 Q. B. D. 447 .....   | 11  |
| —— v. Vestry of St. Lukes ..... | L. R. 7 Q. B. 148 ..... | 724 |

## R.

|  |                                     |          |
|--|-------------------------------------|----------|
| Radley v. London and North Western<br>R. W. Co. .... | 1 App. Ca. 754 .....                | 69, 348  |
| Railroad Company v. City of Richmond.                | 6 Otto. 96 U. S. 527 .....          | 36       |
| Randall v. Lithgood .....                            | 12 Q. B. D. 525 .....               | 303      |
| Reddick v. Saugeen .....                             | 14 O. R. 506 .....                  | 424      |
| Redhead v. Midland R. W. Co. ....                    | L. R. 2 Q. B. 412 ; Ex. Ch. 4 Q. B. | 379, 392 |
| Reese River v. Attwell .....                         | L. R. 7 Eq. 347 .....               | 332      |

| NAMES OF CASES CITED.                       | WHERE REPORTED.                     | Page of Vol. |
|---|-------------------------------------|--------------|
| Regina v. Aberdare Canal Co.....            | 14 Q. B. 854 .....                  | 377          |
| — v. Bond .....                             | 1 B. & Ald. 392 .....               | 156          |
| — v. Brown.....                             | 13 C. P. 356 .....                  | 673          |
| — v. Chandler .....                         | 2 Cart. 421 .....                   | 179, 195     |
| — v. Duncan .....                           | 7 Q. B. D. 198 .....                | 418          |
| — v. Eli .....                              | 13 A. R. 526 .....                  | 414          |
| — v. Fitzgerald .....                       | 39 U. C. R. 297 .....               | 418          |
| — v. Great Western R. W. Co. ....           | 32 U. C. R. 506 .....               | 572          |
| — v. Hall.....                              | 17 C. P. 282 .....                  | 572          |
| — v. Justices of Shropshire .....           | 8 Ad. & El. 173 .....               | 377          |
| — v. Lalibertè .....                        | 1 S. C. R. 117 .....                | 414          |
| — v. Leeds and Bradford R. W. Co. 18        | Q. B. 343 .....                     | 169          |
| — v. Mills .....                            | 17 C. P. 354 .....                  | 673          |
| — v. Paris .....                            | 12 C. P. 445 .....                  | 673          |
| — v. Port Perry.....                        | 38 U. C. R. 431 .....               | 418          |
| — v. Rankin .....                           | 16 U. C. R. 304 .....               | 569          |
| — v. Russell .....                          | 3 E. & B. 942 .....                 | 418          |
| — v. St. Mary's, Whitechapel ....           | 12 Q. B. 120 .....                  | 169          |
| — v. Sanderson .....                        | 3 O. S. 103 .....                   | 569          |
| — v. Yorkville .....                        | 22 C. P. 431 .....                  | 572          |
| Reid v. Gowans .....                        | 13 A. R. 501 .....                  | 503          |
| Rettinger v. McDougall .....                | 10 C. P. 395 .....                  | 327          |
| Rex v. Pease.....                           | 4 B. & Ad. 30 .....                 | 67           |
| — v. Southerton .....                       | 6 East 126 .....                    | 645          |
| Reynolds v. Bullock .....                   | 38 L. T. N. S. 443 .....            | 114          |
| Richardson v. Great Eastern R. W. Co. 1     | C. P. D. 342; L. R. 10 C. P. 486    | 392          |
| Ricketts v. East and West India Dock Co. 12 | C. B. 174 .....                     | 67           |
| Rigley v. Garnett .....                     | 2 DeG. & Sm. 629 .....              | 386          |
| Roberts, re, Goodchap v. Rodgers.....       | 14 Ch. D. 49 .....                  | 141          |
| Robertson v. Thomas .....                   | 8 O. R. 20 .....                    | 521          |
| Robinson v. Great Western R. W. Co.. 35     | L. J. C. P. 123.....                | 649          |
| — v. Mollett .....                          | L. R. 7 H. L. 802 .....             | 550          |
| Rosenberger v. Grand Trunk R. W. Co. 8      | A. R. 482 .....                     | 65           |
| Rotherham Alum & Chemical Co., In re. 25    | Ch. D. 111 .....                    | 283          |
| Rowe v. Rochester .....                     | 29 U. C. R. 595; 22 C. P. 319 ..... | 717          |
| Ruck v. Williams .....                      | 3 H. & N. 308.....                  | 723          |
| Rusden v. Pope .....                        | L. R. 2 Ex. 277, 3 Ex. 269 .....    | 519          |
| Russell v. Plaiçe.....                      | 18 Beav. 21 .....                   | 742          |
| Ryan v. The Bank of Montreal .....          | 14 A. R. 533 .....                  | 587          |

## S.

|   |                                    |          |
|---|------------------------------------|----------|
| Salmon v. Duncombe.....                           | 11 App. Cas. 634 .....             | 77       |
| — v. Tidmarsh .....                               | 5 Jur. N. S. 1380 .....            | 755      |
| Samo v. The Gore District Mutual Ins. Co .....    | 1 A. R. 568 .....                  | 365      |
| Sands v. The Standard Ins. Co.....                | 26 Gr. 113, 27 Gr. 167.....        | 421      |
| Sault v. Sault .....                              | Cr. & P. 240 .....                 | 302      |
| Saunders v. Vautier .....                         | 44 U. C. R. 523 .....              | 384      |
| Sauvey v. Isolated Risk .....                     | 26 U. C. R. 263.....               | 365, 424 |
| Scragg v. City of London.....                     | 6 T. R. 607 .....                  | 629      |
| Seddon v. Tutop.....                              | 4 H. & N. 298 .....                | 317      |
| Semple v. Nicholson .....                         | 40 U. C. R. 188, 2 A. R. 396 ..... | 538      |
| Shannon v. Gore District Ins. Co .....            | 2 S. C. R. 394, 410.....           | 371      |
| — v. Hastings.....                                | 4 Ex. 580 .....                    | 371      |
| Sharrod v. London and North Western R. W. Co..... | 3 B. & Ad. 362 .....               | 67       |
| Shears v. Rogers .....                            | L. R. 10 C. P. 502.....            | 207      |
| Sheppard v. Whitaker .....                        |                                    | 101      |



| NAMES OF CASES CITED.                                     | WHERE REPORTED.                     | Page of Vol. |
|---|-------------------------------------|--------------|
| Shepley v. Hurd.....                                      | 3 A. R. 549 .....                   | 249          |
| Shingler v. Holt.....                                     | 30 L. J. Ex. 322 .....              | 520          |
| Simm v. Anglo American Telegraph Co.                      | 5 Q. B. D. 188.....                 | 593          |
| Simmons, Re .....   | 15 Q. B. D. 348.....                | 151          |
| Simpson v. The Savings Bank.....                          | 56 N. H. 466.....                   | 196          |
| Sims v. Thomas.....                                       | 12 A. & E. 536 .....                | 335          |
| Singleton v. Eastern C. R. W. Co .....                    | 7 C. B. N. S. 287 .....             | 66           |
| Silver Valley Mines, Re.....                              | 21 Ch. D. 381.....                  | 289          |
| —— v. The Dominion Telegraph Co...                        | 10 S. C. R. 238 .....               | 101          |
| Sinclair v. Great Eastern R. W. Co....                    | L. R. 3 C. P. 391.....              | 149          |
| —— v. Argicultural Mutual Ins. Co.                        | 18 C. P. 19.....                    | 365          |
| Slater v. Oliver .....                                    | 7 O. R. 158.....                    | 84, 230      |
| Schröder v. Harnott .....                                 | 28 L. T. N. S. 702 .....            | 518          |
| Smith v. Chadwick .....                                   | 20 Ch. D. 7 S. C. 9 App. Cas. 187.. | 602          |
| —— v. Crooks .....  | 3 Gr. 321 .....                     | 112          |
| —— v. Everitt.....  | 27 Beav. 456 .....                  | 114          |
| —— v. Kay .....   | 7 H. L. C. 770.....                 | 577          |
| —— v. Land and House Co .....                             | 28 Ch. D. 16 .....                  | 602          |
| —— v. McLellan .....                                      | 11 O. R. 191 .....                  | 738          |
| —— v. Midland .....                                       | 4 O. R. 498 .....                   | 432          |
| —— v. Wheeler .....                                       | 1 Vent. 128 .....                   | 741          |
| Snowball v. Proctor .....                                 | 2 Y. & C. Ch. Cas. 278 .....        | 759          |
| Spill v. Maule .....                                      | 4 Ex. 232 .....                     | 94           |
| Stanhope Silk Stone Collieries Co., Re..                  | 11 Ch. D. 160.....                  | 309, 326     |
| Stanley v. Roper.....                                     | 17 U. C. R. 69 .....                | 376          |
| Staple, The, Mayor of the v. The Bank of<br>England ..... | 21 Q. B. D. 160.....                | 615          |
| Stebbing v. Metropolitan Board of Works.                  | L. R. 6 Q. B. 37, 45 .....          | 11           |
| Stenmeyer v. The City of St. Louis ....                   | 3 Mo. App. R. 256.....              | 734          |
| Stephenson v. Higginson .....                             | 3 H. L. Cas. 638.....               | 154          |
| Steuart v. Gladstone.....                                 | 10 Ch. D. 626.....                  | 118          |
| Stewart v. London and North Western<br>R. W. Co. ....     | 3 H. & C. 135 .....                 | 389, 662     |
| —— v. Rounds.....   | 7 A. R. 517 .....                   | 412          |
| St. John v. Rykert .....                                  | 10 S. C. R. 278.....                | 139          |
| Stone v. Stone.....                                       | L. R. 5 Ch. 74.....                 | 161          |
| Stonehouse v. Enniskillen .....                           | 32 U. C. R. 562 .....               | 720          |
| Sturgis v. Crowinshields .....                            | 4 Wheat 122.....                    | 175, 196     |
| Swanson v. North Eastern R. W. Co. ..                     | 3 C. P. D. 341.....                 | 485          |
| Symonds v. Cincinnati .....                               | 14 Ohio 174.....                    | 2            |

## T.

|   |   |     |
|---|---|-----|
| Talley v. Great North Western R. W. Co. | L. R. 6 C. P. 44 .....                          | 389 |
| Tallman v. Atlantic Fire Ins. Co. ....  | 29 How. 71.....                                 | 274 |
| Tate, Re .....                          | 5 U. C. L. J. N. S. 260.....                    | 169 |
| Tawler v. Chatterton.....               | 6 Bing. 258 .....                               | 169 |
| Teale v. Younge.....                    | McL. & Y. 486 .....                             | 235 |
| Tench v. The Great Western R. W. Co.    | 33 U. C. R. 8 .....                             | 96  |
| Thomas v. Quartermaine .....            | 18 Q. B. D. 697.....                            | 68  |
| Thompson v. Bedford .....               | 21 U. C. R. 545.....                            | 569 |
| Thorpe v. Cooper.....                   | 5 Bing. 129; 11 C. P. 589; 6 C. P.<br>249 ..... | 317 |
| Titus v. Durkee .....                   | 12 C. P. 367 .....                              | 249 |
| Toledo R. W. Co. v. Jacksonville .....  | 67 Ill. 37.....                                 | 37  |
| Tolhausen v. Davies .....               | 4 T. R. 328 .....                               | 68  |
| Toronto, Bank of v. Fanning .....       | 18 Gr. 391 .....                                | 476 |
| —— v. Lamb .....                        | 12 App. Cas. 575 .....                          | 209 |
| Toronto, City of v. Great Western.....  | 25 U. C. R. 571 .....                           | 631 |

| NAMER of CASES CITED.                             | WHERE REPORTED.                     | Page of Vol. |
|---|-------------------------------------|--------------|
| Toronto Street R. W. Co. v. Fleming ..            | 37 U. C. R. 116 .....               | 636          |
| Touche v. Metropolitan Warehousing Co             | L. R. 6 Ch. 677 .....               | 277          |
| Toulmin v. Millar .....                           | 12 App. Cas. 746 .....              | 419          |
| Traill v. Baring .....                            | 4 DeG. J. & Sm. 330 .....           | 577          |
| Trash v. Wood .....                               | 4 M. & C. 324 .....                 | 759          |
| Troy and Boston R. W. Co. v. Lee ....             | 13 Barb. 159 .....                  | 2            |
| Tuff v. Warman .....                              | 5 C. B. N. S. 740 .....             | 348          |
| Tunney v. The Midland R. W. Co.....               | L. R. 1 C. P. 291 .....             | 485          |
| Turner v. Lucas .....                             | 1 O. R. 623 .....                   | 685          |
| Tuson v. Evans .....                              | 12 A. & E. 733 .....                | 93           |
| Tweddle v. Atkinson.....                          | 1 B. & S. 393 .....                 | 271          |
| Twycross v. Grant.....                            | 2 C. P. D. 469, 530 .....           | 328          |
| Tyrone, Earl of v. The Marquis of Waterford ..... | 1 D. F. & J. 613, 6 Jur. N. S. 657. | 755          |

## V.

|  |                                  |         |
|--|----------------------------------|---------|
| Valin v. Langlois .....                              | 5 App. Cas. 119 .....            | 177     |
| Vane v. Rigden .....                                 | L. R. 5 Ch. 666 .....            | 742     |
| Victoria Mutual Fire Ins. Co. v. Bethune et al. .... | 1 A. R. 398 .....                | 302     |
| Vines v. Arnold .....                                | 8 C. B. 632 .....                | 320     |
| Vogel v. Grand Trunk R. W. Co. ....                  | 10 A. R. 162, 11 S. C. R. 112. . | 18, 390 |

## W.

|   |                               |          |
|---|-------------------------------|----------|
| Wade v. Jenkins .....                             | 2 Giff. 509.....              | 118      |
| Wakelin v. London and South Western R. W. Co..... | 12 App. Cas. 41.....          | 348      |
| Wallace Huestis Grey Stone Co., Re....            | 3 Cart. 374 .....             | 180      |
| Waller v. Loch .....                              | 3 Q. B. D. 619 .....          | 97       |
| Wannamaker v. Green .....                         | 10 O. R. 547 .....            | 372      |
| Wansley v. Smallwood .....                        | 11 A. R. 439 .....            | 289      |
| Ware v. Regents Canal Co .....                    | 3 Deg. & J. 212 .....         | 722      |
| Warnock v. Kloeffer .....                         | 14 O. R. 292 .....            | 235      |
| Waters v. Donnelly .....                          | 9 O. R. 391 .....             | 340      |
| Watkins v. Rymill.....                            | 10 Q. B. D. 178.....          | 399      |
| Watson v. Hayes .....                             | 5 My. & Cr. 125 .....         | 381      |
| Watt v. Gore District .....                       | 8 Gr. 530 .....               | 270      |
| Webb v. Stenton.....                              | 11 Q. B. D. 530.....          | 299      |
| Webster v. The British Empire .....               | 15 Ch. D. 176 .....           | 140      |
| Westhead v. Ryley .....                           | 25 Ch. D. 413 .....           | 304      |
| Westmacott v. Hanley .....                        | 22 Gr. 382 .....              | 280      |
| White v. Lord.....                                | 13 C. P. 289 .....            | 684      |
| —— v. Wilson .....                                | 1 Drew. 304.....              | 742      |
| Whiting v. Hovey .....                            | 12 A. R. 119 .....            | 512      |
| —— v. Hovey .....                                 | 13 A. R. 7 .....              | 84       |
| Wickham v. Lee .....                              | 12 Q. B. 521 .....            | 319      |
| Wilby v. The Standard Ins. Co.....                | 3 O. R. 115 .....             | 365      |
| Wild's Case.....                                  | 6 Rep. 17 .....               | 753      |
| Wilkinson, Ex parte .....                         | 22 Ch. D. 788 .....           | 361      |
| Williams v. Bailey .....                          | L. R. 1 E. & I. App. 200..... | 340, 577 |
| —— v. Great Western R. W. Co. ..                  | L. R. 9 Ex. 159 .....         | 66       |
| Williamson v. Farwell .....                       | 35 Ch. D. 128.....            | 742      |
| Wilmott v. Barber.....                            | 15 Ch. D. 96 .....            | 616      |
| Wills v. Carman.....                              | 14 A. R. 656 .....            | 292      |
| Wilson v. Bennett .....                           | 5 DeG. & S. 475 .....         | 743      |
| —— v. Johnstone .....                             | L. R. 16 Eq. 606.....         | 112      |
| —— v. Truman .....                                | 6 M. & G. 236.....            | 590      |

| NAMES OF CASES CITED.     | WHERE REPORTED.        | Page of Vol. |
|---------------------------|------------------------|--------------|
| Wilson v. Xantho .....    | 12 App. Cas. 503 ..... | 647          |
| Wiltsie v. Ward .....     | 8 A. R. 549 .....      | 290          |
| Winter v. Keown .....     | 22 U. C. R. 341 .....  | 375          |
| Wood v. Dunn .....        | L. R. 2 Q. B. 72 ..... | 299          |
| — v. Perry .....          | 3 Exch. 442 .....      | 319          |
| Woodley v. Mitchell ..... | 11 Q. B. D. 47 .....   | 649          |
| Worrell v. Jacob .....    | 3 Mer. 256 .....       | 742          |
| Wright v. Woodgate .....  | 2 C. M. & R. 573 ..... | 93           |
| Wynkoop v. Seal .....     | 64 Pa. 361 .....       | 557          |

## Y.

|  |                      |     |
|--|----------------------|-----|
| Yokham v. Hall .....                   | 13 Gr. 235 .....     | 457 |
| Yorkshire Banking Co. v. Beatson ..... | 5 C. P. D. 127 ..... | 410 |
| Young v. Higgin .....                  | 6 M. & W. 49 .....   | 377 |

## Z.

|                                      |                         |         |
|--------------------------------------|-------------------------|---------|
| Zunz v. South Eastern R. W. Co. .... | L. R. 4 Q. B. 539 ..... | 19, 400 |
|--------------------------------------|-------------------------|---------|

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## MEMORANDUM.

On the 27th of October, 1888, the Honourable CHRISTOPHER SALMON PATTERSON one of the Judges of the Court of Appeal for Ontario was appointed a Puisne Judge of the Supreme Court of Canada, *vice* the Honourable WILLIAM A. HENRY, deceased.

On the same day JAMES MACLENNAN, of the city of Toronto, one of Her Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day the Honourable JAMES MACLENNAN, one of the Judges of the Supreme Court of Judicature for Ontario was appointed a Judge of the Court of Appeal for Ontario, *vice* the Honourable CHRISTOPHER SALMON PATTERSON.





### ERRATA, &c.

- Page 103—Line 9 from bottom of head-note. insert after “dissenting,” 15  
O. R. 84.
- 109—Line 12 from top, insert 15 O. R. 84.
- 138—Line 2 from bottom of head-note, for “was” read “were,”
- 244—Line 5 from bottom of head note, insert after Q. B. D., 16  
O. R. 699.
- 299—Line 9 of head-note “18” should be “14.”
- 364—Line 2 for “596” read “506.”
- 372—Line 5 from bottom of head-note, for “547” read “457.”
- 432—Line 1 of head-note, “1887” should be “1877.”
- 432—Line 6 of head-note, for “204” read “384.”
- 432—Line 8 of head-note, for “530” read “550.”
- 457—Line 3 from bottom of page, for “13 O. R.” read “12 O. R.”
- 605—Line 2 from bottom of head-note, for “63” read “51.”
- 744—Line 1 for “defendant” read “plaintiffs.”

# ONTARIO APPEAL REPORTS.

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JAMES V. THE ONTARIO AND QUEBEC RAILWAY  
COMPANY.

*Railway—Expropriation of lands—Compensation—Date at which value is to be ascertained—Increase in value owing to railway itself—Deviation of street.*

*Held*, affirming the judgment of FERGUSON, J., 12 O. R. 624, that in ascertaining the compensation to be made to a landowner for land expropriated for a railway under R. S. C. ch. 109 sec. 8, the value of the part taken (as well as the increased value of the part not taken, which by sub-sec. 21 is to be set off) must be ascertained with reference to the date of the deposit of the map or plan and book of reference, under sub-sec. 14, (or in this case with reference to the date of the notice or determination to expropriate) and therefore such value should include an increase which may have been caused by, or is owing to, the contemplated construction of the railway.

*Semble*, per BURTON, J. A., that what is intended by sub-sec. 21 is a direct or peculiar benefit accruing to the particular land in question and not the general benefit to all landowners resulting from the construction of the railway.

*Semble*, per OSLER, J. A. The land in question not having been taken for the purpose of the railway strictly, but, after the same had been laid down, for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway.

THIS was an appeal by the defendants and cross-appeal by the plaintiff from the judgment of Ferguson, J., reported 12 O. R. 624, where and in the present judgments the facts are clearly stated.

The appeal came on for hearing before this Court on the 29th of November, 1887.\*

*Robinson*, Q. C. and *Wells*, for the appellants (defendants).

*Delamere* and *English*, for the respondent (plaintiff).

\*PRESENT—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

The following amongst other authorities were referred to : *Davidson v. Boston, &c. R. W. Co.*, 3 Cush. 92 ; *Boynton v. Shirley R. W. Co.*, 4 Cush. 469 ; *Great Western R. W. Co v. Baby*, 13 U. C. R. 119 ; *Canada Southern R. W. Co. v. Norvell*, 41 U. C. R. 207 ; *Symonds v. Cincinnati*, 14 Ohio 174 ; *Betts v. Williamsburgh*, 15 Barb. 255 ; *Troy and Boston R. W. Co., v. Lee*, 13 Barb. 159 ; *Hayes v. The Chicago, &c., R. W. Co.*, 17 Am. and Eng. Railway Cases 112 ; *Re Ontario and Quebec R. W. Co., and Taylor*, 6 O. R. 345 ; *Pierce on Railways*, 210, 221 ; *Redfield on Railways*, 262.

January 10, 1888. BURTON, J.A.—Assuming this case to come within the provisions of the 47th Vict. ch. 11, (D.), I fail to see any ground for interfering with the judgment of the learned Judge upon the defendants' appeal.

The market value of the land at the time of the deposit of the plan is ordinarily the criterion of the sum to be paid for the land actually taken, and it is admitted that there was no difference in this case in the value between that date and the time adopted for that purpose by the learned arbitrator.

What price would it have then brought in the market would have been the sole question if the whole of the plaintiff's land had been taken ; and it would have been quite immaterial whether that value was or was not brought about by the contemplated railway, or by any other cause then existing, or in prospect, if in fact the land could then have been disposed of at the price allowed by the arbitrator.

Of course, as only a portion of the plaintiff's land was taken, he would be entitled to claim, in addition to the value of the land taken, for any damage caused to the remainder of the property of which it formed a part by reason of its severance.

As at present advised, the arbitrator, if he erred at all, appears to me to have done so in not awarding in addition to the value of the land taken, the sum of \$335, by which

he found a portion of the remaining land deteriorated in value. That question is not, strictly speaking, before us, as no such point appears to have been taken by the plaintiff against the award; but although the question is not before us for decision, I find it necessary in order to explain my reason for arriving at the conclusion that the award is too favorable to the defendants, to state shortly my view of the section which defines the duty of the arbitrators in estimating the value and compensation in cases coming within it, as for the purpose of this decision I assume this to come, and by which they are directed "to take into consideration the increased value that would be given to any land through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway." R. S. C. ch. 109 sec. 8, sub-sec. 21.

To my mind, what is intended by the enactment is a direct or peculiar benefit accruing to this land in particular, and not the general benefit resulting to all land-owners from the construction of the railway.

It would be unreasonable to impute to the Legislature an intention to place a person whose land is compulsorily taken in a worse position than the owners of land in his immediate vicinity whose lands are not so taken, which they would do if they allowed such general resulting benefit to be set off against the value of the land actually taken; whereas, if by reason of the remaining land being in close proximity to the railway station, or the lands which were previously wet and swampy being drained by the work, or for similar reasons, it acquires a greatly increased value altogether apart from the general increase, there is no sound reason why such special benefit should not be set off against the damages resulting from the construction, and even against the value of the land taken.

I cannot state my view more concisely than by adopting the language of the Court in one of the American cases (*Betts v. Williamsburgh*, 15 Barb. 255,) to which we have been referred.

“In estimating the damages resulting from the road, consequential or speculative damages are to be rejected, and in estimating the advantages such only as are special or peculiar to the property in question are to be considered, and not such as are common to the public.”

Entertaining this view, I think the award of the arbitrator is too favorable to the company; as if I understand his mode of computation, he has taken into account not any benefits peculiar to this land, but such as were common to other land-owners in the vicinity; but however that may be, I think that it has not been shewn that any error has been made in appraising the value of the land taken, of which the defendants are entitled to complain, and therefore the defendants' appeal fails.

Upon the cross-appeal I think there has been an error in the computation, although, if the matter were open to us, I should have thought that sum should have been added to the plaintiff's award. I think, therefore, the cross-appeal also fails.

PATTERSON, J. A.—Some questions which have been mooted on the part of the plaintiff, who is before us as respondent, do not properly arise for decision on this appeal, and they are of sufficient importance in connection with the operation of the compensation clauses of the Railway Act to call for, as they doubtless will receive, more full argument in some other case.

The appeal is from the judgment of Mr. Justice Ferguson delivered on the appeal to him from the report of the arbitrator, and our functions are confined to a review of that judgment, and of the portions of the report which were the subjects of the appeal to Mr. Justice Ferguson.

I have had an opportunity of seeing the judgment of my brother Osler, and I cannot add anything to what he has written. I shall merely state in other words the conclusions which, after a careful consideration of the matter, seem to me to dispose of the present appeal.

Sub-section 11, of section 9, of the Consolidated Railway Act, 1879, declared that “the deposit of a map or plan, and



book of reference, and the notice of such deposit, shall be deemed a general notice to all the parties of the lands which will be required for the railway and works." An amendment made in 1884 by 47 Vict. ch. 11, sec. 11, (D.), added that "the date of such deposit shall be the date with reference to which the compensation or damages shall be ascertained as aforesaid."

This amendment was of later date than the transactions now in question. It is unnecessary to consider whether it should be regarded, as Mr. Robinson argued, as dealing only with procedure, and therefore as governing the arbitration held in 1884, after the passing of the Act, but under an order of court made before the passing of the Act; or was merely declaratory of the effect of the Act of 1879; because, although the map, &c., were deposited in 1882, they did not shew this land as required for the railway or works.

The land was taken for the purpose of making a road in substitution for Charles street, along which the railway was to be constructed, and the new street was made under an order made in September, 1883, by the railway committee of the Privy Council in the exercise of powers which, as far as they related to the case of a railway which ran along a street, and did not merely cross the street, were first conferred in May, 1883, by 46 Vict. ch. 24, sec. 4, (D.) That section made applicable to the case of any land required for the proper carrying out of the requirements of the railway committee all the provisions of law applicable to the taking of land by railway companies, and its valuation and conveyance to them, and to the compensation therefor.

The company gave notice under sub-sec. 12 of sec. 9 of the Act of 1879, in obedience to the order of the committee, in April, 1884. That seems to be the earliest act which can be treated, for the purpose of fixing the date as of which the damages or compensation should be ascertained, as equivalent to the exhibition of the land on the map or plan and book of reference. A similar notice had been given in the preceding August, but we need not inquire

what effect, if any, it had, because it is found as a fact that the value of the land was the same in April, 1884, as it had been in August, 1883.

The valuation, then, ought to be as of one of those dates. We may speak of the earlier one, because it is the one spoken of in the report.

The value of the plaintiff's whole land in August, 1883, is found to be \$9,321.75, and the value of what was left \$6,763, shewing the value of what was taken to be \$2,558.75. The company is not charged with this sum, but the arbitrator finds that the item of \$6,763, or the value of the residue, is and was in August, 1883, an enhanced value to the extent of \$1,296.03, from the effect of the construction of the railway upon the general selling price of lands in the vicinity, and he deducted that sum from the \$2,558.75.

The company appealed to Mr. Justice Ferguson, not, of course, objecting to a deduction being made, but insisting that the land taken should not have been valued at its selling price as enhanced by the existence or prospect of the railway, but at the price it would have brought if uninfluenced by the effect of the railway, and that from the amount thus ascertained the increment in value of the residue, should be deducted.

The contention seems to open one of those larger questions, or perhaps more than one, which lie outside of the present inquiry.

The point for us to decide is, whether it was wrong to take the date of the notice, or of the decision to expropriate this land, as the date with reference to which the compensation was to be estimated.

We cannot say that it was wrong to do so, but from the observations I have made upon the statute, it seems to be the proper date to adopt.

This view may, perhaps, imply a question of the right of the company to the benefit of the deduction; but that was not a question made in the Court below, and as I have said, we are not reviewing the award further than as there attacked.



Another matter complained of below, and there decided in favor of the company, has been made the subject of cross-appeal by the plaintiff.

It relates to an item of \$335.67, which the company complained had been computed twice by the arbitrator.

Mr. Delamere's argument to shew that it had only been computed once, was ingenious and almost convincing, but on carefully looking at the figures, it is clear that the learned Judge was right in holding as he did.

A part of the plaintiff's land, forming a triangular building lot, was valued by the arbitrator at \$1,200 on an estimated frontage of seventy-four feet. The residue of it, estimated at fifty-four feet frontage, he valued at \$540, treating the part taken as worth \$660—as at first sight one would conclude. Then in estimating the increased value of the whole residue, the arbitrators arrived at the sum of \$1,296.03, by allowing \$1,631.70 as the increase on the whole, excluding the triangle, and he held that the railway had depreciated the residue of the triangle by \$335.67, and therefore subtracted that sum from the \$1,631.70, making the net increase \$1,296.03.

That this was allowing the \$335.67 twice over is apparent from noticing that if the triangle at its original estimated frontage of seventy-four feet was worth \$1,200 it should, when reduced to fifty-four feet, have been, in the same proportion, worth \$875.67. But it was put down at \$540. In other words the \$335.67 was deducted in that valuation, and should not have been deducted again.

We must dismiss both the appeal and the cross appeal.

OSLER, J.A.—The litigation between these parties began in the shape of an action for an injunction to restrain the defendants from obstructing Charles street, a public highway in the township of York, on which the plaintiff's property abutted, and along which the defendants had carried their railway in a manner otherwise than permitted by law. I do not think it is plainly made out that they proposed to acquire any part of the plaintiff's property, for the construction of their railway as originally laid out, and as shewn on their map or plan and book of refer-

ence. But we see that by an order in council of the 21st September, 1883, approving a report of the railway committee of the Privy Council made under the authority of 46 Vict. ch. 24, sec. 4, (D.) a deviation of Charles street over the plaintiff's land (the same having been assented to by the municipal council of the township of York), was acquiesced in and authorised, "in order to obviate the carrying of the railway along that street."

The land substantially taken from the plaintiff is therefore so taken for the diversion of Charles street in such a way as to enable the defendants to maintain their road as laid down and constructed along the original street, and it has been treated by all parties as being land taken by the defendants for the purposes of the railway within the meaning of the Railway Act.

By a consent order made in the cause on the 1st April, 1883, the plaintiff's motion for injunction was refused, and it was referred to the learned Judge of the County Court of the county of York as sole arbitrator, "under the Railway Act of 1879, and an official referee under the Ontario Judicature Act and the Rules of this Court, to inquire and state what compensation was payable to the plaintiff by the defendants for the land taken by them for the purpose of their railway, including the making a diversion of Charles street, and what damages he was entitled to, if any, under the provisions of the Consolidated Railway Act, 1879, and any Acts amending the same, or otherwise by reason of the diversion of Charles street, and the taking of the said lands, the exercise of any of the powers granted by the said Acts, and the construction of the railway."

By the same order the defendants were directed to serve a notice upon the plaintiff according to the provisions of sub-sec. 12 of sec. 9 of the Act, shewing the proposed diversion, and the land required therefor, and the compensation they were willing to pay for the same, &c.

The defendants accordingly on the 7th of April, 1884, served such a notice, with a description of the land intended to be taken "for the purpose of constructing and operating their railway thereon, and for the purpose of diverting

Charles street," as shewn on the plan annexed to the notice. The compensation offered was \$1,000.

It is stated in the arbitrator's first report, that the defendants first gave notice of their intention of taking the land in question by a notice dated the 22nd August, 1883, a month before the date of the order in council. Their right to give such notice at that time, is not apparent, nor its legal effect upon the present proceedings. They had carried their line along an existing highway, relying, it may be presumed, either upon obtaining leave from the municipal authorities therefor, pursuant to sec. 15, sub-sec. 1, of the Railway Act (R. S. C. ch. 109, sec. 12, sub-sec. 1), or upon the obtaining authority from the Privy Council, with the assent of the municipality, to make a deviation of the highway as they have now done.

However that may be, I cannot see that they were in a position to acquire the plaintiff's land compulsorily until after the order of the Privy Council of the 21st September, 1883.

The arbitrator's first report was not satisfactory to either party and for some reason, not explained to us, was set aside.

He made a second report which the defendants moved against, and which on one point has been referred back to him, but has, in other respects, been confirmed by Mr. Justice Ferguson.

The defendants appeal from that part of his decision, and there is a cross-appeal by the plaintiff against the reference back to the arbitrator as to the item which the learned judge thought should have been disallowed.

As to the cross-appeal I think the plaintiff has not pointed out any error in the judgment. It very plainly appears on the face of the report that one item of damages, viz., the loss in respect of lot 1, has been twice charged against the defendants. The cross-appeal should therefore be dismissed.

The defendants' appeal is substantially against the mode in which the arbitrator has ascertained the value of the land taken by them.

They contend that he should first have ascertained such value independently of the existence of the railway, that is, as it would have been had the railway never been projected or heard of, and should then have deducted therefrom, the increased value given to the (adjoining) lands of the plaintiff through or over which the railway passed, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway; the difference between the values thus ascertained being the compensation to which the plaintiff was entitled.

Another objection to the award was, that the arbitrator had charged the defendants with interest from the date of the notice to arbitrate, whereas it should only have been charged from the date on which the company took possession of the land. The point was somewhat laboured on the argument, but as the difference appears to be, as one of the learned counsel for the company expressed it, "so small as to be scarcely worth troubling about," we may adopt that view, and decline to decide it.

It was also strenuously urged that the arbitrator had ascertained the value of the land taken with reference to the date of the notice of the 22nd August, 1883; whereas the statute, 47 Vict. ch. 11, sec. 11, (D) declares that the date of the deposit of the plan and book of reference in the office of the Minister of Railways, shall be the date with reference to which the value of the land taken shall be ascertained.

As, however, there was no substantial difference between the values of the land at these two dates, there is nothing in this objection which calls for a decision, even if it be assumed that the Act, though passed after the order of reference was made, has a retrospective operation and applies to the present arbitration.

To return to the principal objection.

Under the English Acts, the railway company is required to pay the owner full compensation for the value of the land taken or injuriously affected, and for all damages sustained by the owner.



In *Stebbing v. Metropolitan Board of Works*, L. R. 6 Q. B. 37, 45, Lush, J., says :

“The value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him.”

Lord Esher, M. R., in the *Queen v. Essex*, 17 Q. B. Div. 447, 451, says :

“The compensation given under the Lands Clauses Act, is based on this theory, that the claimant is selling his land to the persons who are to pay compensation, but he is to have more than he would have as a mere vendor, because he is a vendor compelled to sell.”

It has been held that the compensation clauses of the Railway Act, Consol. Stat. Can. ch. 66, should receive the same construction as the corresponding clauses of the Lands Clauses Consolidation (Imperial) Act, relating to the nature and extent of the company's liability. Our general Acts are now modified in this respect by provisions already cited, not found in the English Acts. The increased value given to the owner's other land is to be taken into consideration, and set off against the compensation which would be otherwise payable to him, and the date of filing the plan is to be that with reference to which the compensation shall be ascertained.

I am of opinion that the learned arbitrator has not erred in favor of the owner, at all events in the principle on which he has arrived at the amount of the compensation awarded to the plaintiff for the land taken by defendants. It appears to me to be a moderate and just award (except as to the inadvertent error already alluded to), for a smaller sum than the defendants had offered to pay, and one of which they, at all events, have no reason to complain. If the value of the land taken is to be ascertained as of a fixed date, that must be its then value, as resulting from all existing and surrounding circumstances, including any increase therein which may have

been caused by, or is owing to the contemplated construction of the railway. The Act does not say that such value is to be ascertained irrespective of the railway, or without the railway, as the defendants argue, but that "the date of the deposit of the map or plan, and book of reference shall be the date with reference to which the compensation or value, &c., shall be ascertained."

That provision will apply to the increased value of other lands, by which the compensation for the lands actually taken may be reduced. And I can conceive of no reason why the then market value of the latter should not, *primâ facie*, subject to such reduction, be the minimum compensation to be awarded to the owner.

It may be that in cases like those selected for illustration by the railway company in their reasons of appeal, where there is no great disproportion between the quantity of land taken by them, and that which is retained by the land-owner, the increase of value in the latter will not materially, or at all, reduce the amount payable to the owner, but where the conditions are reversed, as is commonly the case, the advantage to the company is manifest.

In the case before us I am disposed to think that a view much more favorable to the owner might have been adopted by the arbitrator, as I doubt if it is one to which the provisions of the 47 Vict. apply.

The land now taken was not, as I gather from the notice of the 7th April, 1884, and the accompanying surveyor's affidavit, shewn upon the original map or plan and book of reference filed. The railway had been laid down upon Charles street, as shewn thereby, and the necessity for acquiring the plaintiff's land arose subsequently. It was taken, not for the purpose of deviating the line of the railway under sec. 7, sub-sec. 11, R. S. C. ch. 109, but for deviating Charles street under the order of the Privy Council and the assent of the municipality. I am not satisfied that the company had then the right to insist that the increased value which the plaintiff's other lands might have already acquired in consequence of the construction of the rail-

way upon Charles street, could be set off against the compensation payable for the lands so taken, or that this compensation could be based upon any thing else than the value of the lands in April, 1884 or perhaps September, 1883, the date of the order in council. If any increase in value in the plaintiff's remaining land, beyond that which it had already acquired in consequence of the construction of the railway, was owing to the deviation of Charles street, it might be proper to take that into consideration [47 Vict. ch. 11 sec. 3, R. S. C. ch. 109 sec. 74], but this would probably be the limit of the company's right.

It is, however, unnecessary to consider this question further, as I am of opinion that the judgment below is right, and that the defendants' appeal should be dismissed.

I should add in reference to the judgment of Mr. Justice Burton, that I do not think it necessary to express any opinion upon the question whether the increase of value of surrounding land which is to be set off against the value of the land taken is confined to some special and peculiar value caused to it by the railway over and above the increased value acquired by it in common with surrounding lands.

That question involves the consideration of several decisions of our own Courts, and I prefer to leave it open till it arises.

HAGARTY, C. J. O., concurred.

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## MCMILLAN V. THE GRAND TRUNK RAILWAY.

*Railway company—Shipment of goods to a point beyond defendants' line—Negligence—Construction of conditions of contract—R. S. C. ch. 109 sec. 104.*

An action to recover damages for the loss of goods consigned to be carried by the defendants from Toronto to McGregor station, on the C. P. Railway in Manitoba, and for injury sustained by other goods from water and for delay in transport. The line of the defendants' road extended as far as Fort Gratiot, Michigan, and the goods were carried the rest of the way by other companies, and were damaged by the negligence of one or more of such companies.

The defendants sought to protect themselves from liability by setting up the 10th condition indorsed on the receipt given to the plaintiff for the amount paid by him for carriage, which was as follows: "Goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention occurring after the said goods arrive at said stations, or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

*Held*, that the contract of the defendants was to carry the goods to McGregor station; and in its true construction, the 10th condition applied only to the forwarding of the goods from the place to which the defendants had contracted to carry them, whether that was a place on the line of the defendants' or a connecting railway, and had not the effect of limiting the liability of the defendants to matters occurring on their own line only.

*Collins v. Bristol and Exeter R. W. Co.*, 7 H. L. Cases 194, followed.

*Held*, also, that the provisions of the Railway Act, R. S. C. ch. 109 sec.

104, which preclude a railway company from relieving themselves from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of the company or its servants, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the Parliament of Canada.

The judgment of the Q. B. D. (12 O. R. 103) affirmed, but on different grounds.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 12 O. R.

103, where the pleadings in the case and the evidence adduced on the trial are sufficiently set forth; and came on for hearing before this Court on the 10th and 11th of November, 1887.\*

*Wallace Nesbitt*, for the appellants.

*Robinson, Q.C.*, and *A. Galt*, for the respondent.

January 30, 1888. BURTON, J.A.—There was, I think, no evidence proper to submit to the jury of a verbal contract to carry in this case. The goods were, according to the evidence of the plaintiff's agent, not received by the defendants to be carried except upon the terms of the receipt which was proved at the trial, which was handed to the plaintiff's agent, and which he had every opportunity of reading if he chose to do so. If he did not care to do so, the liability of the defendants cannot be increased by reason of such neglect on his part. Having failed therefore to prove his statement of claim, the learned Judge might have dismissed the action, and the plaintiff can scarcely be heard to complain if he has permitted the case to go on as if he had alleged the written contract which was the only contract proved, and which the defendants do not dispute.

The conversations spoken of by the plaintiff's agent with some persons about the station, cannot be tortured into a contract binding upon the company, and there is ample evidence, not in any way contradicted, of its being the invariable mode of dealing adopted by the company not to receive goods to be carried on any other than a written shipping bill, which was the course pursued on the present occasion.

The case resolves itself into a question of the construction of that contract. I think that the contract was one entire contract on the part of the Grand Trunk Railway to carry the goods from Toronto to Macgregor, but subject to

*Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

the conditions indorsed upon it, one sum is paid for the whole journey.

The Grand Trunk Company are not bound to undertake the carriage of goods beyond their own line or lines operated by them; it is quite competent therefore to them if they choose to enter into a contract to carry goods beyond the limits of their own lines, to specify the terms and conditions on which they undertake that kind of business, and the provisions of the Railway Act which preclude them from relieving themselves from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of the company or its servants do not apply to such a contract.

But is there anything in condition 10 which was relied upon in the present case, to relieve them from responsibility for the damage and loss, in consequence of their having occurred after the goods left the defendants' line?

I do not read it as thus limiting their liability. I think that condition was framed with the view to relieve the company from its liability as carriers, and to convert it into that of warehousemen, at the risk of the consignees, whenever the goods had arrived at their final destination, whether upon their own line or any other to which they had undertaken to carry them, or at points upon their own line from which they were to be further despatched by an independent mode of conveyance. If the company intended to have limited their liability to anything occurring upon their own line, which I have no doubt they might have done, they ought to have stated it in a manner incapable of being misunderstood.

I agree, therefore, in thinking that the judgment should be affirmed, although for different reasons from those relied upon in the Court below.

PATTERSON, J. A.—This is an action to recover damages for the loss of some goods consigned from Toronto to McGregor station, on the Canadian Pacific Railway in Manitoba, and for injury sustained by other goods by wet, and for delay in the transport of them.

The Canadian Pacific Railway Company were joined as defendants. The whole claim of the plaintiff was \$2,000. He received and accepted \$650 in full satisfaction from the Canadian Pacific Railway Company, without abandoning his claim against the Grand Trunk Railway Company ; and it is conceded that if entitled to recover against that company he is entitled to \$1,350, for which he at present has judgment.

The plaintiff came with his family from Ireland in 1881, and after remaining nine months in Toronto he went to Manitoba. He went in March, 1882, and his family followed him in May. His brother John McMillan lived in Toronto, and had done so for twelve or fourteen years. The plaintiff depended on John to see to forwarding his effects, telling him, as he says in his evidence, which was taken in Winnipeg under a commission, to send them at such a time as that they would reach the station at Portage la Prairie, or at McGregor, at or before the arrival of the family. The family prepared to leave, and did leave Toronto on the 24th or 25th of May ; but it was not until the 22nd or 23rd that John McMillan arranged for forwarding the effects. On the 22nd he went to the freight department of the Grand Trunk Railway to see about the matter, and it will be useful at the outset to note the evidence and findings as to what was done.

The main contention on the part of the plaintiff is, that the goods were received and carried on an oral contract made by John McMillan with the company. [The learned Judge then considered the evidence on this point, and as to the signing of the receipt, and referred to the findings of the jury on the questions submitted to them, and to the judgments delivered in the Court below, and continued:]

I see no sufficient reason for dissenting from the conclusion that the contract of the Grand Trunk Railway Co. was to carry the goods to McGregor Station. The reasoning on which the decision of *Bristol and Exeter R. W. Co. v. Collins*, 7 H. L. Cas. 194, proceeded seems to me to fit



the facts of this case so closely as to make it unnecessary to go more at large into the subject.

It is equally clear that the learned Judge who tried the action, was right in holding that there was no contract to carry on any mere oral arrangement.

The case is far from being the simple one of delivery of goods to a common carrier to be carried under his common law liability.

The provisions of the Consolidated Railway Act, 1879, following those enactments which were so much discussed in *Vogel's Case*, 10 A. R. 162; 11 S. C. R. 612, were contained in section 25, and are now to be found in R. S. C. ch. 109, sec. 104. The duties there declared to be obligatory, are not, in anything of importance at present, distinguishable from those incumbent at common law upon common carriers. They are to start and run trains at regular hours fixed by public notice, and to furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously there to offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains; and it is declared that such passengers and goods shall be taken, transported to and from, and discharged at, such places, on the due payment of the toll, freight, or fare lawfully payable therefor.

Those provisions apply, by section 3, sub-sec. 3, to all railway companies and railways within the legislative authority of the Parliament of Canada, except Government railways; but they extend no farther. The statute imposes no duty with respect to traffic over foreign railways, and leaves the company free to prescribe the terms on which it will undertake the carriage of goods over other lines than its own.

The plaintiff is not assisted by cases of the class of *Muschamp v. Lancaster and Preston R. W. Co.*, 8 M. & W. 421, and *Malpas v. London and South Western R. W.*

Co., L. R. 1 C. P. 336, in which the contract was effected by the actual delivery to and receipt by an agent of the company of the goods to be carried. What he depends on is a mere conversation with some clerk, but who the clerk was, or what were his duties, he does not know. In the delivery of the goods, and their receipt by the company, other persons were concerned at every step taken, and, as I have shewn from the evidence, there is no room for contending that they were received upon an oral agreement, nor any uncertainty as to the terms of the written documents: *Parker v. South Eastern R. W. Co.*, 2 C. P. D. 416, and *Zunz v. South Eastern R. W. Co.*, L. R. 4 Q. B. 539, may be usefully referred to on this branch of the case.

The goods left Toronto on the 25th May, and arrived at Fort Gratiot, or Port Huron, which is in the State of Michigan, and is the western terminus of the Grand Trunk Railway, on the 27th. The next part of the route was over the Chicago and Grand Trunk Railway to Chicago; but it appears that the car was detained at Port Huron until the 10th of June by some proceedings of the United States customs officers. Nothing turns upon this, though one of the rather extravagant contentions at the trial was that the oral contract to be deduced from John McMillan's evidence was to send the goods through without delay from customs or anything, and in time to reach Manitoba as soon as the family.

From Chicago to St. Paul another railway had to forward the goods, and a fourth to St. Vincent, where they passed into the charge of the Canadian Pacific, and reached Winnipeg on the 22nd of June.

So far the goods were in the car in which they left Toronto, which was sealed before starting by the Grand Trunk Railway officials, and sealed again as a bonded car by the U. S. Customs officers at Port Huron. At Winnipeg the goods were unloaded and placed in the customs warehouse, where they remained till the 24th of July, when they were sent by a Canadian Pacific Railway car to Portage, arriving there, as it is said, on the next day.



The month's delay at Winnipeg is not shewn to have been unavoidable, but a greater delay occurred before the plaintiff received the goods at Portage, the delivery being only on the 10th of October. The damage to the goods, and the loss of two packages, seem to be understood, and are no doubt properly assumed, to have occurred after the Canadian Pacific Railway had charge. No question of fact on the subject was left to the jury, but I gather from, amongst other indications, the judgment delivered after the trial, that the understanding was as I have mentioned.

Whatever may be the liability of the Grand Trunk Railway Company, as a matter of contract, there does not appear to be any evidence of negligence on the part of the immediate servants of that company.

Now let us look at the conditions on which the defendants rely for immunity. The 10th condition is, that all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them ; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse, (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatever. But the delivery of the goods by the company will be considered complete, and all responsibility of the said company shall cease, when such other carrier shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance ; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention that may happen to goods so sent by them, if such loss, misdelivery, damage, or detention occur after the said goods

arrive at the said stations or places on their line nearest to the points or place which they are consigned to, or beyond their said limits.

This condition is almost identical with a condition, also numbered 10, which was in question in *Collins v. Bristol and Exeter R. W. Co.*, 11 Ex. 790; 1 H. & N. 517. 7 H. L. Cas. 194. One variation is in the words: "Consignees at points beyond the places at which the company has stations," where the English condition reads: "Consignees resident beyond the limits of the company's local regulations for the delivery of goods from the different stations of the railway." This variation is slight, if in effect it differs from the original. The next is more noteworthy. We have the not very intelligible phrase, "and respecting which no direction to the contrary shall have been received at those stations," substituted for "and respecting which no directions to the contrary shall have been received previous to arrival at the station." In the *Collins Case* the condition was construed by the House of Lords to apply only to the forwarding of goods from the place to which the company had contracted to carry them, whether that was a place on the line of the company, or on a connecting railway. The same reading of the language is appropriate to this condition, and there are some reasons for adhering to it in addition to those found in the English form. It is in evidence that the Grand Trunk Railway Company had a choice between two routes from Toronto, viz., by the old Great Western route to Detroit, and thence by the Michigan Central Railroad to Chicago, and by Port Huron, and thence by the Chicago and Grand Trunk Railway. The construction of the condition for which they contend would authorize what no one can suppose to have been intended, viz., that the company might warehouse the goods at Detroit or Port Huron, pending communication with the plaintiff in Manitoba. No direction as to forwarding from either of those termini had been received at the places designated in the condition as "those sta-

tions," whatever that means. But a direction had been given in Toronto to forward to McGregor Station, and the company had undertaken to do that and had been paid for doing it.

The obligation to carry through on a contract like this one is conceded by the 11th condition, which makes a special provision for the event of part of the route off the company's line, being by water :

" 11. That all property contracted for at a through rate or otherwise, to or from places beyond the limit of the Grand Trunk Railway if shipped by water, shall, while not on the company's railway or in their sheds or warehouses, be entirely at the owner's risk," &c.

The tenth condition is thus inapplicable.

The third condition is not pleaded, though at first sight, it would seem to provide for immunity where the injury was occasioned by wet. On examination, however; it will appear that the defendants were well advised in not relying upon it.

It reads as follows :

" Nor will the company be liable for damages occasioned by delays caused by storms, accidents, over pressure of freight, or unavoidable causes, or by the weather, wet, fire, heat, frost, or delay of perishable articles, or from civil commotion."

Taking the fact to be that the damage from wet would not have happened in the absence of negligence, the negligence having been that of the Canadian Pacific Railway Company when acting as agents of the Grand Trunk Railway Company, the first question would be the power of the company to impose the condition.

*Vogel's Case* must not be understood to go farther than the decision really warrants. It turned upon the enactment already in part referred to (R. S. C. ch. 109, sec. 104), which, after prescribing certain duties in the carriage of passengers and goods, proceeded to declare that "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company; from

which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company, or of its servants."

There was some difference of opinion both in this Court and in the Supreme Court, as to whether the transaction, which was the hiring of a car for the carriage of horses to the plaintiff, who was at liberty to load the car to its full capacity, or to put in as few horses as he pleased, came within the scope of the statute; and while it was held in both courts that conditions, indorsed as these are on the shipping note of the company, came within the statutory terms, "notice, condition, or declaration," neither Court was quite unanimous in so holding; but none of the judges in either Court doubted that the statute, in giving the action and in restraining the imposition of conditions for immunity from liability for negligence, dealt only with actions for breach of the duty which it prescribed.

In *Vogel's Case*, the contract was to carry from one station of the Grand Trunk Railway to another; and in *Morton's Case*, which was decided at the same time, though the contract was to carry to Manitoba, the accident happened upon the Grand Trunk Railway.

In the case in hand, therefore, we should clearly be compelled to consider the construction and effect of the condition if the default and the damage had occurred during the transit of the goods through the United States. The situation would then have been not unlike that in *Zunz v. South Eastern R. W. Co.*, L. R. 4 Q. B. 539.

Is that position altered by the fact that the goods reached Manitoba in safety and suffered the damage within the territorial jurisdiction of Parliament

I do not think it is. The duty incumbent on the Grand Trunk Railway Company under the statute, relates to its own railway only. It is no more bound to carry over the Canadian Pacific Railway than over the New York Central, or the Chicago, Milwaukee and St. Paul. The company may contract to carry to places on any one of those lines,

but its contract will resemble that in question in *Collins Case*, which was a contract by the Great Western Railway Company to carry from Bath to Torquay, a station on the South Devon Railway. The Bristol and Exeter Railway connected the other two, and the goods were destroyed by an accidental fire while on that road. One condition was that the Great Western Company would not be answerable for the loss of or for damage to any goods arising from fire. Alderson, B., giving the judgment of the Court of Exchequer, said (11 Ex. 797) :

“ We think that there was a contract by the Great Western Railway Company to carry the goods the whole way to Torquay, and of course the condition against fire extends to protect them against loss from such cause during the entire journey.”

This opinion was approved in the House of Lords.

That decision at first sight, would seem to tell in the defendants' favour, so far as the damages are for injury from wet ; but there is the important difference between the cases, that in the one the fire was accidental, and in the other the wetting is attributed to the negligence of the railway people.

Upon the general subject of conditions under which immunity is claimed, even when the loss has been caused by negligence, it would be useless to enter anew upon a discussion of the decisions which were very fully examined in the judgments delivered in this court in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601.

It results from that discussion that there is power to secure such immunity by means of a condition aptly framed for the purpose. Let us, therefore, give attention to the terms of this condition, remembering, of course, that the case is peculiarly one for giving against the company whose language it is, any ambiguity or doubt arising from the terms of the condition.

The idea that negligence is meant to be covered by the condition is certainly not suggested by reading it. There is nothing equivalent to the expression “ however caused,”



on which so much stress was laid in decisions commented on in *Fitzgerald's Case*; much less is there such an express reference to negligence as was embodied in the condition in *Doolan v. Midland R. W. Co.*, App. Cas. 7921.

There is no reason for assuming, in advance, an intention to do more by the condition than protect the company from some of the responsibility cast at common law upon the carrier, who was not only bound to exercise skill and diligence, but was also an insurer.

The rule of *noscitur a sociis* is also suggested by the enumeration in the condition of a number of casualties with which no idea of negligence is associated: storms causing delay, accidents, over-pressure of freight, unavoidable causes, weather, the perishable nature of the goods carried, civil commotion; and when we find among this class of casualties the other causes—wet, fire, heat and frost, it is more consonant with sound interpretation to assign them to the same class than to understand the stipulation to point to injury arising from negligent exposure.

For these reasons, I think the third condition ought not to be construed to protect the defendants from the consequence of neglect of duty by their agents.

But I do not consider the condition applicable to the circumstances.

The company adopted Portage la Prairie instead of McGregor, as the station to which the goods were to be carried. Mr. Belcher, the station agent, says that was because there was no agent at McGregor, which agrees with the plaintiff's statement that when he went to Portage on the 27th of May to meet his family, he learned that there was no convenience for receiving goods at McGregor, and verbally asked that they should be stopped at Portage, repeating his request by letter two days afterwards.

There is nothing in the evidence to suggest that the goods did not all arrive at the Portage, the date being given as the 25th of July, and were not all at that time in good order. The only cause for complaint up to that time,

would seem to be the month's delay at Winnipeg. Then came the long delay. Mr. Belcher says that his clerk, by his directions, addressed a notice upon the arrival of the goods to the plaintiff at McGregor, not knowing that he lived at Gladstone.

It does not seem certain that there was a post office at McGregor.

On the 19th of September, a notice was sent by post card to Gladstone. That was the first intimation to the plaintiff of the arrival of the goods, though he had, as he deposes, been diligent in trying to find them. Mr. Paul who was teaming between Gladstone and Portage inquired for them, the last time being on the 28th July, three days after they are said to have arrived ; and the plaintiff himself went on the 31st to McGregor and thence to Portage and on to Winnipeg, but could not find them though he examined the baggage at the two last named stations. The reply to his inquiries was that the goods had not arrived.

The conclusion of fact indicated by this evidence is that the injury occurred and the missing packages were lost during these two months, and no account of the goods is given to rebut that inference.

The negligence and the resulting injury therefore, happened after the transit was over, and when, but for the default of the company, the goods would not have been in their possession.

The condition cannot, by any fair interpretation, be made to apply to such a state of facts.

Another obstacle is, the fact that, after all, the complaint may be put on the ground of delay in the delivery of the goods. The injury may be fairly enough ascribed to the delay, if a prompt delivery would have saved the goods from exposure. The delay was not occasioned by any of the causes enumerated in the condition.

Another condition which was pleaded, was No. 12, which is, "that no claim for damage to, loss of, or detention of any goods for which this company is accountable,

shall be allowed unless notice in writing and the particulars of the claim for said loss, damage, or detention are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which the claim is made are delivered."

Some interrogatories bearing on this condition were included amongst those answered under the commission at Winnipeg, but no point seems to have been made upon it at the trial. There is no finding of fact respecting it. It does not appear to have been insisted on, or even alluded to, in the Divisional Court, and it has not been mentioned in the reasons of appeal, or in the argument before us. It may have been thought to be not strictly applicable to the circumstances under which the claim of the plaintiff arises, or to have been complied with in substance if not to the letter.

The construction of the contract, as being a through contract to carry to McGregor station, was resisted by the argument, amongst others, that such a contract would be *ultra vires*; and the objection has been included in the reasons of appeal, where it is urged that the company's powers are only those defined in sub-sec. 9 of sec. 6, of R. S. C. ch. 109—viz., to take, transport, carry, and convey persons and goods on the railway, meaning their own railway.

It strikes me that a decision in favor of this objection, would cause the company some embarrassment; but there is no foundation for it. The powers given by section 56 of the statute, or so much of that section as was contained in the Consolidated Railway Act, 1879, sec. 60, are amply sufficient.

But the objection goes only to the form of the remedy, and not the root of the company's liability. The goods were actually received and dealt with, and if not liable upon the contract, the company would be liable in tort.

The appeal must, in my opinion, be dismissed.

OSLER, J. A.—I think that the contract of the defendants was one entire contract to carry to McGregor Station,

and that the tenth condition of the special contract pleaded in the third paragraph of the statement of defence is to be construed in the manner pointed out by my brother Patterson. It is, as is said by Lord Wensleydale in the *Bristol and Exeter R. W. Co. v. Collins*, 7 H. L, 238, "to be construed as applicable to goods carried solely on the (Grand Trunk Railway) to one of its stations, and consigned to persons living beyond its local limits for delivery to whom the company is to have an option to send by a carrier or private hand as opportunity may offer, or not to send at all, but to allow the goods to remain at the risk of the owner pending communication with them."

It, therefore, cannot be relied on by the defendants as a defence to the action. The same construction of this condition was indicated and applied by Wilson, J., in *Mason v. The Grand Trunk R. W. Co.*, 37 U. C. R. 163.

In disposing of the case on this ground, it seems unnecessary to decide, and I do not decide whether it comes within the decision in *Vogel v. Grand Trunk R. W. Co.*, as that case was applied in the Court below, or whether the defendants can contract themselves out of liability for loss caused by negligence in the carriage of the goods where it occurs elsewhere than on their own line of railway.

I concur in dismissing the appeal.

HAGARTY, C. J. O.—I agree in the judgment just pronounced. We have had no small discussion on the subject of the meaning to be attached to the conditions, and cannot feel surprised at the difficulty in the way of shippers of freight in forming any clear view of the documents, either that they are asked to sign, or which are given to them as receipts for their property.

I cannot believe that the forms adopted can be intended in their shape, microscopic type, and curiously involved language to mislead.

It might be a fairly reasonable condition to attach to the receipt of goods to be carried to ultimate destination over several lines of railway, partly through a foreign

country, that the company would not be responsible for losses or damage caused off or beyond their own line, and that in receiving and taking through freight, they only acted as agents for the other lines. But the shipper should see this declared in clear intelligible form so that he might clearly understand his risk and the company's liability.

Even if I did not fully agree with my brother's translation of these bewildering conditions, I should feel it but fair to give the benefit of any reasonable doubt to the shipper.

*Appeal dismissed, with costs.*

[This case has been carried to the Supreme Court.]

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## THE CORPORATION OF THE CITY OF TORONTO

## V.

## THE TORONTO STREET RAILWAY COMPANY.

*Street Railways—Agreement as to operating—By-law—Ultra vires.*

In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the City of Toronto, in which they agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober and civil agents, conductors and drivers to take charge of the cars upon the the said railways, and that they and their agents, conductors, drivers and servants would at all times \* \* operate the said railway, and cause the same to be worked under such regulations as the common council of the City of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privileges granted by the agreement. Subsequently the privileges so conferred upon those persons were assigned to the defendants who continued to work several railways, and after some years introduced for use thereon smaller cars, drawn by one instead of two horses as had been done previously, and with only one man in charge instead of two as on the larger cars.

In 1852 the council of the city passed a by-law (No. 1264,) prohibiting the operation of any cars within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief.

*Held*, [reversing the judgment of the Court below,] OSLER, J.A., dissenting. (1.) That the by-law in question was not within the terms of the agreement, and that it was therefore *ultra vires*. (2.) That the by-law was also invalid as it was an invasion of the domestic concerns of the company.

THIS was an appeal by the defendants from the judgment of Boyd, C., pronounced on the 20th November, 1886, whereby the defendants were restrained from using cars upon the lines of railway operated by them in the City of Toronto, without having a conductor as well as a driver upon each and every car.

The statement of claim filed in May, 1886, set forth at considerable length an agreement entered into by the City of Toronto with one Alexander Easton for the construction of street railways along certain streets in the city, and the passing of an Act of the Parliament of Canada in May,

1861, incorporating the said Easton and others as "The Toronto Street Railway Company"; and that by certain proceedings thereafter taken the charter became vested in the present defendants.

The statement further set forth that; "On the 18th day of December, 1882, by a certain by-law of the plaintiffs entitled 'By-law number 1264 respecting Street Railways,' it was \* \* enacted, among other things, by the plaintiffs, that from and after the passing of that by-law every street railway car in use on the several lines of street railway in the City of Toronto shall be provided and furnished not only with a driver, but also with a conductor, who should discharge his duties as such conductor in the manner provided by by-law number 353 \* \* and that it should not be lawful for any person or persons, or body corporate, to use or operate any street railway in the City of Toronto with cars not having both conductors and drivers thereon when such cars were in use on the streets of the said city; but, notwithstanding the said by-law number 1264 and repeated remonstrances of the plaintiffs, and notwithstanding the contracts and obligations under the said other by-laws, agreements and statutes, the defendants still persist in using and operating their street railways with cars not having conductors thereon as well as drivers, to the great detriment of the public and contrary to their express obligations to the plaintiffs."

The plaintiffs therefore asked that the agreements above referred to might be specifically enforced as against the defendants; payment of \$5,000 as damages resulting from the breach by the defendants of their said agreements and covenants; an injunction ordering and restraining the defendants, their servants, workmen, and agents using or operating any cars upon their lines of street railway in the City of Toronto without having conductors as well as drivers.

The defendants set up amongst other defences, that the by-law of the plaintiffs of the 18th of December, 1882, was ultra vires of the plaintiffs and that the plaintiffs had no power or authority under the statutes in the statement of claim mentioned or otherwise to enact the same: that the provisions made by the said by-law were not in anywise

necessary or requisite for the protection of the citizens of Toronto, or of the persons or property of the public, and that the said by-law was passed *malâ fide* and ought not in equity and good conscience to be enforced.

The case having been put at issue came on before the chancellor on the 12th of November, 1886, when evidence was taken for several days and on the 20th Nov. judgment was pronounced as above.

The appeal came on to be heard before this Court on the 7th of March, 1888.\*

*McCarthy*, Q.C., and *Shepley*, for the appellants.

*Robinson*, Q.C., *H. O'Brien*, and *Lefroy*, for respondents.

April 20, 1888. HAGARTY, C. J. O.—It is not necessary to set out the clauses in the original agreement, the statute and the by-law of 1861, and the other documents, as they are fully noticed in the judgment of my brother Patterson.

I am unable to accept the view that under the terms of the agreement of 1861, the presence of a conductor as well as a driver is required on each car. As I understood the argument before the learned Chancellor, it was in substance that under the clause in the agreement authorizing the making of regulations by the city, the regulation or requirement of this by-law was justifiable. If the right construction of the agreement require a conductor in all cases besides the driver, there is nothing further to be argued, and the by-law or resolution, whatever it be called, was an unnecessary proceeding. If the decision rest merely on the wording of the agreement, then, I am sorry to say that I have to a great extent misunderstood the substantial argument of the able counsel for the city.

Presented in this shape, we have only to look at the agreement and the original by-law of 1861, and on the two clauses—one that the company shall employ careful, sober

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON and OSLER, JJ. A.

and civil agents, conductors and drivers to take charge of the cars—and the clause: “The conductors shall announce to the passengers the names of the streets, &c., as the cars reach them.”

Do these words necessarily import a specific contract that on every car there must be a conductor as well as a driver.” 2nd. Is such a contract so clear and definite that it would be enforced by injunction ?

The first clause, as I read it, means that the persons acting as agents, conductors, or drivers, shall be careful, sober, and civil, and the second, that an officer or servant acting as conductor, shall announce the names of the streets.

The learned Chancellor says: “The broad question, which, of course, lies at the root of everything, . . . the validity of this by-law.” Again, “It cannot be said that this by-law dealing with the conductors is one which infringes upon the privileges granted by the resolution. It merely makes distinct that which would be rather a matter of inference in the original agreement. It makes distinct in the changed condition &c. which arose afterwards when one-horse cars were put on. If the circumstances are such as to give rise to the necessity of exercising the power given by the statute, the council can pass rules as they see best; can pass by-laws from time to time, to protect the persons and property of the public;” and at the conclusion of his judgment he says, that the action is the *bonâ fide* action of the city council upon a by-law which seems to him to be within the power of the council, passed to give protection to passengers and the public.

The formal judgment of the Court declares that plaintiffs are entitled to specific performance of the agreement of March, 1861. This formal judgment makes no reference to the by-law, but rests the right upon the original contract.

In this view, apart from the by-law or regulation, a very serious question arises whether the agreement is so definite and precise and clear in its terms that any court of equity would interfere by injunction. I speak with due



caution in expressing a clear opinion on such a point, but I am bound to say that I do not think such an interference by the strong arm of injunction would be granted. Viewing the case solely as one of contract in 1861, many important questions would be capable of being pressed with far greater force than they would be with the additional introduction of the by-law. I mean the long standing by or apparent acquiescence on the part of the city during the years that elapsed from the first use of the one-horse cars, and the universal knowledge of everyone in the city, that the extensions were being made on the principle of the less costly car system. It may be argued for the city that whenever police regulations become requisite from increase of population or other altered circumstances, no argument should avail as to acquiescence in a line of conduct on the company's part; but if the case be rested wholly on the construction of a contract made over twenty-five years ago, it seems to me that the very gravest grounds exist against the exercise of the drastic remedy of injunction or mandamus.

I am of opinion that the plaintiff's right to succeed in this appeal cannot be supported wholly on the basis of the terms of the original agreement.

It may be, of course, properly resorted to to explain and support the by-law of 1882, but I cannot think it is available by itself to support the decree.

We have to consider whether the by-law of 1882, whether it be considered as a by-law or regulation requiring the company to have on every car a conductor in addition to the driver, is within the power of the city council to force upon the company, either under their contract with the company or under their general corporate powers.

It is beyond all question, on the evidence, that its enforcement must have a most serious effect on the value of the franchises of the company in forcing on them a very large extra expenditure.

It seems to me to be also very clear, on the evidence, that



it was on the urgency of the city council that about 1873-4, and on the threats of chartering other companies, that the defendants were induced to lay down a series of extensions, and to continue doing so from time to time over routes in the less populous parts of the city, which, unless worked on economical principles, could not prove remunerative—that the one-horse car was well known to be the vehicle to be adopted by the company over these extensions—that they adopted it, and after it had been in use from year to year, the city again urged further extensions, which, on their urgency and on the known alternative, were made to be worked in the same way ; and then, after the lapse of eight years' user, the by-law complained of was passed, to force them to have two instead of one man to manage these one-horse cars.

It appears to me that this interference by the city can only be warranted if it fall under the head of a police regulation, such as a municipality in the exercise of its ordinary right to watch over the safety of the people, may exercise. The right to legislate "for the protection of the person and property of the public," is not usually exercised by directing the employment or prescribing the functions of a larger number of servants of a public company, or of a particular manufactory, or in the prosecution of any trade or business.

Such matters as the rate of speed, the carrying of lights at night, the placing of a number, of the owner's name on all vehicles—street cars, the licensing, the width of tires, provisions for the protection of the roadway or track, the taking of certain precautions at crowded spots or crossings, the prevention of the street being obstructed or blocked by unnecessary stoppage or accumulation of street cars ; these and all such cognate matters may be conceded as falling generally within the corporation's general right to make and enforce police regulations.

But as soon as the attempt is made to prescribe the number of horses to be used with each carriage, or the number of servants who must be employed to drive or con-

duct the same, we are confronted with a very serious question as to jurisdiction over such matters.

The learned Chancellor in resting his view of the case, chiefly on the contract, says, "It is very important to observe that the regulations are such as the city of Toronto may deem necessary. The railway is not to judge, but the city. The council are to judge as to what is necessary and requisite for the protection of the persons and property of the public."

I feel great difficulty in accepting the proposition in the extensive sense in which it is thus enunciated. If it be sound, it of course places the 'defendants' company wholly within the power of the city, and can be used to turn an enterprise fairly remunerative into a positive loss. Under this view the city could, with an equal "show of reason," insist on an extra conductor to guard the safety of the passengers and public while the ordinary conductor was employed collecting the fares, thus having three instead of two men employed.

It seems to be conceded in the American cases that the Court has always to consider whether an exercise of municipal authority as to companies, either chartered by the State or authorized by the local authorities, is reasonable.

The judgment of the Supreme Ct. U. S. in 1877, (*Railroad Comp'y v. City of Richmond*, 6 Otto, 96 U. S. 527) delivered by the late Chief Justice Waite, discusses the general question. The Court below had finally settled the reasonableness of the city ordinances, the only question for the supreme tribunal was that of jurisdiction. *Frankford v. City of Philadelphia*, 58 Penn. State. Rep. 119, shews that a company chartered to carry passengers through a city was not necessarily exempted from liability to municipal regulations, and that a reasonable regulation of the use of a privilege is not a denial of the right, and the right to question its reasonableness is conceded. The general subject and the nature of "police powers" are discussed in 1 *Dillon Municipal Corporations*, secs. 390 to 407.

I have seen no case in which a general right to interfere in the internal economy of a trading corporation—regulating the numbers of servants they must employ, has been exercised. There is a case in New Jersey, 12 Vroom 127 in which the municipality having *express* power given them by the Legislature, were upheld in ordering a railway company to place a flagman.

In *Toledo R. W. Co. v. Jacksonville*, 67 Ill. 37, the municipality directed a flagman to be kept by the railway company at a particular crossing. The Court held it unreasonable on the evidence at that particular crossing, as it did not require it, but they recognise the right to so direct at a place where the public safety required it—that if they could order it at that place when the Court held it unnecessary, the company might be compelled to keep a flagman at every road and street crossing on its entire line.

The *Brooklyn Co. v. City of Brooklyn*, 44 S. C. N. Y. 413, is the nearest in its facts. The Court was strongly of opinion that a by-law requiring a conductor as well as a driver on each street car could not be supported. I refer to the reasons assigned, “there is a wide distinction between regulating the use of the public streets and entering into the management of the private business of those who have occasion to use them.”

It was said, as to the power given by the charter of the city to regulate common carriers and carriers of passengers: “It would seem to be plain that where the Legislature had granted power to the company to run cars in the manner it should deem best, that the city under the power of regulating common carriers of passengers could not provide for the number of the employees on each car or the number of horses it should use.”

Barnard P. J., p. 414, notices that by the existing law, “the construction, maintenance and operation of the road is made subject to all laws of the city for the regulation of horse railroads generally,” and he adds, “I do not think this power sufficient to legalise an ordinance requiring a conductor on the cars as well as a driver.”

It is also noticed that under the general municipal law such a by-law must be general in its application, not confined to the one carrier company.

All this seems to throw the city back to rest wholly on their contract.

I am wholly unable to view this case in the aspect in which it has presented itself to the learned Chancellor.

I agree in the opinion of my learned brother Patterson, whose judgment I have had the benefit of perusal, that this by-law or regulation cannot be supported as properly within the contract between the parties, and that if within the power of the city to enact, it must be as in the nature of a police regulation—under the general authority of the corporation—and it ought generally to be of common application, and not aimed specially at a particular company or a particular manufactory, or a particular carrier of passengers or goods. I am not, however, judging it wholly on any narrow ground. We are often called upon to consider whether a by-law of a municipality is within their chartered powers, or is reasonable in its nature or provisions, that is in general restraint of trade, that it is partial in its operation, not general in its application, granting unfair preference or privilege, &c., &c. See such cases as *Calder Navigation Co. v. Pilling*, 14 M. & W. 86, and cases cited in last ed. of our Municipal Manual in notes 215 and 216.

If I have the right to judge of the reasonableness of this by-law, I do not hesitate to express my opinion as being against it, and as I read the evidence, no case was made out to warrant its enactment.

In *Elwood v. Bullock*, 6 Q. B. 401, Sir J. Coleridge says : “Whether a by-law is for the regulation of trade or for purposes of police, it must be reasonable and just.

The use of these single horse cars is shewn to have been for years common in the large cities on this continent, and we can hardly suppose that the intelligent members of the municipality did not share the knowledge of their use common to the rest of the world.

Then we find, as already noticed, their introduction and

user for so many years before any suggestion of interference by the city. All this calls for a very strict construction of the right of interference.

The bulk of the evidence as to the existence of a danger to the public, calling for this interference, appears to me to be wholly a matter of opinion, on which the whole adult population of Toronto might be asked to express his or her views.

The evidence of fact seems to me to fall short of proving any case against these cars of any general danger to the public, peculiar to them, and not common to every vehicle or conveyance in which one person only has to attend to his horse as well as to goods or passengers received, carried, or delivered by him.

In theory it may be considered that in all cases whether of cabs, omnibuses, loaded waggons, or street cars, the employment of an extra person specially to look after and guard against accidents to passengers or the public, may afford additional protection. We have to deal, however, with realities, not theories, and with the well understood conditions on which the business of life is carried on.

I am of opinion that no case was made out for the interference of the Court, and that the appeal must be allowed, and the action dismissed.

BURTON, J. A.—I quite agree with the learned Chancellor that the clauses of the agreement of the 26th March, 1861, are to be read as constituting not only the contract between the parties, but also as defining the powers which are entrusted by the Legislature to the city council, and we are relieved from the difficulty of considering the validity of the by-law qua by-law or legislation, inasmuch as the defendants waive any question of that kind and are willing to treat it as a regulation, and the question therefore is reduced to whether this is a regulation which the council are empowered to make under the agreement.

At the time that agreement was made, there was no legislative authority existing for laying down a street



railway within the limits of the city, and the agreement therefore provided that application should be made to the legislature, and as soon as the legislative authority was obtained the plaintiffs should pass a by-law to make it effectual.

Accordingly in the session of 1861, the Toronto Street Railway Company were incorporated, and the agreement in question was validated, and the corporation of the city of Toronto authorized to pass any by-law or by-laws for the purpose of carrying it into effect.

The Act gave full power to construct and operate their railway upon or along any of the streets of Toronto, on first obtaining the consent of the corporation.

That consent had been previously obtained, as to certain streets therein referred to, under the agreement in question, embodying a number of resolutions of the council, prescribing the conditions on which the road was to be constructed and operated, in which after setting forth those conditions also set forth the covenants binding on the railway company among which is the following :

“That the said party of the second part, his heirs, executors, or administrators, shall and will at all times employ careful, sober, and civil agents, conductors, and drivers, to take charge of the cars upon the said railways, and that he the said party of the second part, his heirs, executors, and administrators, and his and their agents, conductors, drivers, and servants, shall and will from time to time, and at all times during the continuance of this grant, and the exercise by him and them of the rights and privileges hereby conferred, operate the said railway, and cause the same to be worked *under such regulations as the common council* of the city of Toronto may deem necessary and requisite for the protection of the persons and property of the public, *and provided such regulations shall not infringe upon the privilege granted by the said resolutions.*”

After the passing of the Act of Parliament, the corporation passed a by-law ratifying the agreement, and authorized the company to proceed with the work under the conditions, provisoes, and restrictions, in the resolutions

and agreement contained, and such other regulations as were therein set forth, or might from time to time be deemed necessary for the protection of the citizens of Toronto.

The agreement provided that the road should not be operated until a certificate was obtained from an officer of the council, and the by-law contains the clause :

“That before the certificate hereinbefore referred to shall be granted, the said Alexander Easton shall submit to the council of the corporation of the city of Toronto for their approval, the rules and regulations for the government and guidance of the conductors and drivers upon the said railways, and others connected with the working thereof, which said rules and regulations when approved by the said council, shall be posted in some conspicuous place in each car or carriage, and no car or carriage shall be run upon any of the said railways without a copy of said rules and regulations being placed therein.”

This was done, and these rules and regulations were approved and sanctioned by the council and are still in force.

As I understand the agreement, the rules and regulations of the company, and which they alone were entitled to make, were to be of no force or effect until sanctioned by the council, and it may be, I do not say it is so, but it may be that any new regulation might require to be sanctioned in like manner, but I do not understand that the city can impose regulations of their own upon the company in reference to the management of their cars, or other purely domestic arrangements or corporate business of the company entrusted by law to the railway corporation itself, and with great deference I think this is a regulation of that nature.

I do not agree with the learned Chancellor in the construction placed by him on the 6th paragraph of the agreement, that it imposed upon the defendants the duty necessarily of having two persons to perform the duties of driver and conductor; pushed to its logical conclusion that argument would not restrict the duty to employ two

persons only, but would require three or even more persons to be employed on each car, for it applies to agents, conductors, drivers and servants. I am satisfied that all that is required under that paragraph is that the company shall employ careful, sober, and civil servants.

No doubt with the double-horse cars a conductor was necessary, and although I do not agree with the counsel for the defendants as to the construction of paragraph seven of the agreement, that the company were under any obligation to furnish cars from time to time of the most modern style, there is nothing in the agreement to prevent them doing so.

The paragraph, however, has only reference to the cars that were to be put on the road at the opening, and before applying for the certificate referred to in the next section.

No doubt, when applying to the council for their consent to lay down rails on other streets than those to which the original consent extended, the council, might prescribe the conditions on which the permission should be granted.

The defendants are of course liable to any person injured by the negligence of their servants, whether that person be a passenger, or one of the public not using the railway; and I take it for granted that the council under its ordinary powers, could pass such reasonable regulations for the protection of the public, which I may designate or distinguish as police regulations, as are not inconsistent with or in derogation of the privileges granted under the agreement and Act of Parliament; but their police powers regulating the general use of the streets and the safety of the public generally are to this extent restricted, that they must not infringe upon the privileges granted by the charter, and resolutions.

But in my view this is a pure matter of internal management which cannot originate with the council, and that there is nothing in the regulations originally sanctioned by the council to prevent their operating the road by the use of the one-horse cars in the manner they are doing.

I think, therefore, that the appeal should be allowed, and the action dismissed, with costs.

PATTERSON, J. A.—The order from which the defendants appeal is, that they, their officers, servants, workmen, and agents be restrained from using or operating cars upon their lines of railway in the city of Toronto, or any part thereof, without having a conductor as well as a driver upon each and every of the said cars and vehicles, the Court further declaring that the plaintiffs are entitled to specific performance of the agreement entered into by them, on March 26th, 1861, in the pleadings mentioned, in this respect.

The agreement was between the city and Alexander Easton. It recited certain resolutions passed by the common council on the 14th of March, 1861, by way of acceptance of a proposal of Easton to construct and operate street railways on some of the streets of the city. There were twenty-four resolutions. No. 7 prescribed the kind of rail to be used, and declared that the cars were to be constructed in the most modern style; and No. 8 provided that each car employed on the railway should be numbered, and that none should be used except under a license for that purpose, for which license the proprietor should pay the annual sum of five dollars. The city, in consideration of the amounts to be paid by Easton, his executors, administrators, or assigns, by and under the resolutions and those presents, and of the covenants and agreements therein on his part to be kept and performed, gave and granted to Easton, his executors, administrators, and assigns, the exclusive right and privilege to construct, maintain and operate street railways by single or double tracks in, along, and upon King street, Queen street and Yonge street, for thirty years, upon the conditions, and subject to all the payments, regulations, provisions and stipulations in the resolutions and those presents expressed and contained. Then followed some covenants by the city, amongst which was a covenant to pass a by-law framed in accordance with the resolutions as soon as legislative power to do so was obtained. Easton also entered into covenants numbered from one to seven.



Nos. 1, 2, and 6 may be specially noticed.

(1) "That he will construct, maintain, and operate the said railways within the times, in the manner, and upon the conditions in the said resolutions and these presents set forth.

(2) That he will well and truly pay the said license fees, and will truly and faithfully perform, fulfil and keep all the conditions, covenants, and agreements in the said resolutions, and these presents expressed and contained on his and their part to be performed, fulfilled, and kept.

(6) That the said party of the second part, his heirs, executors, or administrators shall and will at all times employ careful, sober, and civil agents, conductors, and drivers, to take charge of the cars upon the said railways, and that he the said party of the second part, his heirs, executors, and administrators, and his and their agents, conductors, drivers, and servants, shall and will from time to time, and at all times during the continuance of this grant, and the exercise by him and them of the rights and privileges hereby conferred, operate the said railway, and cause the same to be worked under such regulations as the common council of the city of Toronto may deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations shall not infringe upon the privilege granted by the said resolution-

The Act of 24 Victoria ch. 83, passed on the 18th of May, 1861, incorporated the Toronto Street Railway Company.

That is not the company which is defendant in this action. The enterprise, which it inaugurated, passed through vicissitudes which led to the franchise and property becoming vested in individual purchasers, who obtained in 1873 a new act of incorporation, 36 Vict. ch. 101. The old name was transferred to the new company, and it became subject to the provisions of the former Act, and to the obligations contracted under it so fully that we may discuss the Act as if it had always applied to the defendant company, and may, for all present purposes, treat the defendants as the company incorporated in 1861.

The company was empowered by section 6 to use and occupy such parts of the streets and highways of the city



of Toronto, and of the municipalities immediately adjoining the limits of the city as should be required for laying rails, &c., " Provided always that the consent of the said city and municipalities, respectively, shall be first had and obtained, who are hereby respectively authorized to grant permission to the said company to construct their railway aforesaid within their respective limits, across and along, and to use and occupy the said streets or highways or any part of them for that purpose, upon such conditions and for such period or periods as may be respectively agreed upon between the company and the said city or other municipalities aforesaid or any of them."

By section 14, the city and the adjoining municipalities or any of them, and the company are respectively authorized to make and enter into any agreement or covenants relating to various specified matters, including the time and speed of running of the cars, the amount of license to be paid by the company annually, the amount of fares to be paid by passengers, and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic. And by section 15 the city and the municipalities were authorized to pass by-laws for the purpose of carrying into effect any such agreements or covenants, and containing all necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned and for the enjoining obedience thereto, and also for facilitating the running of the cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the railway should have been laid.

The 16th section declared the agreement of the 22nd of March valid and binding, and authorised the city to pass a by-law or by-laws to carry it into effect.

By-law 353 was accordingly passed in July, 1861. The only clauses of it which require notice are the first three, which read thus:

"1. That the said agreement hereinbefore recited shall be, and the same is hereby ratified and confirmed—and the said Alexander Easton, is hereby authorized to lay down

street railways on King street, Queen street, and Yonge street, and work the same under the conditions, provisions, and restrictions in the said resolutions and agreement contained, and such other regulations as are herein set forth, or may from time to time be deemed necessary by said council for the protection of the citizens of the said city of Toronto.

"2. That so soon as the said railways or any of them are constructed and certified to in the manner, and according to the terms of the said agreement, the said Alexander Eaton may commence to run cars or carriages, and convey passengers thereon, and collect the fare for the same as settled by the said resolution and agreement, and fully operate the said roads.

"3. That before the certificate hereinbefore referred to shall be granted, the said Alexander Easton shall submit to the council of the corporation of the city of Toronto for their approval, the rules and regulations for the government and guidance of the conductors and drivers upon the said railways, and others connected with the working thereof, which said rules and regulations when approved by the said council, shall be posted in some conspicuous place in each car or carriage, and no car or carriage shall be run upon any of the said railways without a copy of said rules and regulations being placed therein."

The injunction is to enforce by-law No. 1264, which was passed on the 18th of December, 1882, and which required that "every street railway car in use on the several lines of street railway in the city of Toronto shall be provided and furnished not only with a driver, but also with a conductor, who shall discharge his duties as such conductor in the manner provided by by-law No. 353" &c.

It is not clear what this last direction is meant to refer to, or how it aids the object recited as the motive for passing by-law 1264, which is to make further provision for the protection of the citizens of Toronto, and prevent accidents resulting from the use of street railway cars without conductors.

One of the resolutions of the 14th of March, 1886, was that the conductor shall announce to the passengers the names of the streets and public squares as the cars reach them. The resolutions are recited in the agreement of

the 22nd of March, and that again in by-law 353; but that by-law does not in any other way provide for the manner in which the conductor shall discharge his duties, except by the general stipulation that all agents, conductors and drivers are to be careful, sober and civil.

This may be of little direct importance.

The great question must be, the power of the city council to impose upon the company the restrictions contained in by-law 1264.

I do not rest at all on the deliverance being cast in the form of a by-law. The objections at one time urged on that score are not insisted on. We are to take it as an expression of the will of the council without necessary regard to the technical form in which it is declared. This is no doubt the proper way to treat the document for the purpose of the present inquiry.

The first question is, the construction of the instruments of 1861, on the combined effect of which primarily depends what may be called the legislative jurisdiction of the council. These are the resolutions, the agreement, the statute, and the by-law 353. This legislative jurisdiction is not necessarily conclusive as to the power or the right to insist on the terms of by-law 1264, but it of course lies at the root of the inquiry.

I do not think anything can turn on the stipulation in Article 6 of the agreement that the company—or Easton whose place the company fills—“shall at all times employ careful, sober, and civil agents, conductors and drivers to take charge of the cars upon the railways,” as in any sense implying an obligation to have a conductor on each car. No one attempts to argue that three men, agent, conductor, and driver, were to be employed, nor has it been suggested that the company required to be bound by contract to have a driver. The draftsman would not be more likely to stipulate for the employment of a conductor than a driver because one would seem to him as much of course as the other, the one-horse car not then having been invented, and the only cars in use being the

large car which carried the two men. His aim evidently was, to omit nobody from his stipulation for carefulness, sobriety, and civility, therefore he inserted the comprehensive word "agents." Instead of "agents, conductors and drivers," he might as well have used the term "agents and servants" which we find in the 14th section of the statute under which alone, as I am about to shew, there was power to make any agreement or regulation for the working of any of the one-horse lines in the city.

The meaning, as I understand it, is no more than that the men employed are to be careful, sober, and civil men, and it is not to provide that any number of men shall be employed. I think that is very plainly expressed, and I think it was understood by the city council just as I understand it.

I account in that way for the fact that one-horse cars were introduced and were run for so many years without objection, and for the movement in the council against them taking the form of a by-law to make *further* provision, &c., and not of an action to enforce an existing agreement to employ conductors on all the cars.

The by-law recites that it is expedient to make further provision for the protection of the citizens of Toronto. This language is, that of the first clause of by-law 353 which authorized Easton to work the railway on King street, Queen street, and Yonge street under the conditions, provisions, and restrictions in the resolutions of the 14th and the agreement of the 22nd of March, 1861, contained, "and such other regulations as are herein set forth, or may from time to time be deemed necessary by said council *for the protection of the citizens of Toronto.*" We find the same language in the first resolution of the 14th of March which authorizes the working of the railways "under such regulations as may be necessary *for the protection of the citizens,*" and in the sixth article of Easton's agreement, where some qualifying words are added by way of proviso which were, perhaps, not essentially necessary.



Easton then agreed that "he, his heirs, &c., and his and their agents, conductors, drivers, and servants would from time to time, and at all times during the continuance of that grant, and the exercise by him and them of the rights and privileges thereby conferred, operate the said railway and cause the same to be worked under such regulations as the common council of the city of Toronto may deem requisite *for the protection of the persons and property of the public*, and provided such regulations shall not infringe upon the privilege granted by the said resolutions."

The qualification thus expressed would most likely have been implied. It is, in effect, a declaration that the contract between the two contracting parties was not to be varied by the separate act of one of them.

It is important to observe that the rights and privileges conferred by that agreement were in respect only of lines of railway on Queen and Yonge streets, and on that part of King street between the Don and Bathurst street.

Rights were afterwards given in respect of other lines; but, if the original agreement applies to them, it is not by its own force, but by the effect of some other agreement into which it may have been, in whole or in part, incorporated.

The terms on which it was extended to some other lines may be learned from a paragraph which I shall read from the statement of claim :

"12. By a certain agreement, under seal, bearing date the 29th day of July, 1881, and made between the plaintiffs of the first part and the defendants of the second part, after reciting that the plaintiffs' council had authorized the construction of certain new lines of street railway in the city of Toronto, and also the extension of certain existing lines along certain other streets upon the terms and conditions set forth in the by-law above referred to, being by-law number 253, and in the several statutes relating to the Toronto Street Railway company, except in so far as modified by the said agreement, the defendants, for themselves and their successors, covenanted, promised, and agreed with the plaintiffs, and their successors, to build, construct, and operate the several lines and extensions of lines in the said agreement more particularly set out and subject to the conditions and terms of the said by-law



number 353, and the several statutes of Canada and province of Ontario relating to the Toronto Street Railway company, and also subject, amongst others, to the following conditions, that the said lines and extensions of lines should be built in the following order: Church street, Strachan avenue and Exhibition road, Dundas street from Queen street to Dufferin street, Queen street from Yonge street eastward to King street, Spadina avenue from College street to Bloor street, and Bathurst street from King street to Bloor street. And it was further agreed and understood by and between the plaintiffs and the defendants, in and by the said agreement, that nothing therein contained should operate to prejudice, interfere with, derogate from, or in any wise modify, except as therein expressly provided, the rights and liabilities of the parties under the agreement, by-law, and statutes theretofore enforced, regulating the relations of the parties thereto, and that the lines of railway tracks to be laid by the defendants under that agreement should, when built, be considered as coming to all intents and for all purposes within the operation of the said former agreements, by-laws, and statutes, except as therein otherwise expressly provided."

This agreement of 1881 does not embrace all the new lines. There are five or six others, besides extensions of the Queen and Yonge street lines.

When we are asked to apply the term of the first agreement to any line but the original lines, we must remember that it can apply only as a new agreement made at the later date under the powers given by the 14th section of the statute; and can only apply by virtue of its adoption by some other substantive agreement like that of 1881; and that the privileges granted in respect of new lines, and which are not to be infringed under color of regulations made by the council, are those granted by the new agreements, and are not necessarily the same as those conferred in respect of the original lines.

Before further discussing that subject, I propose to consider whether the regulation embodied in by-law 1264 is one of those which were to be within the legislative jurisdiction of the council.

What is the force of the thrice repeated expression, "the

protection of the citizens ;" "the protection of the persons and property of the public;" "the protection of the citizens of Toronto" ?

I accede to the argument, on behalf of the company, that the general public using the streets through which the lines of railway run, and not the passengers carried by the cars of the company, are here intended.

This is not because I regard the expression "the public" as altogether inappropriate to denote or to include the persons who use a public conveyance. I find it employed in that sense in the 14th resolution, which requires that, when the track is impeded by snow, sleighs shall be provided for the accommodation of the public. The context there explains what is meant. But here we have "citizens" used as an equivalent term ; we have the fact that the power is reserved by the city in connection with the grant of a right to encroach upon the public easement ; we have no allusion in terms to the protection or convenience of passengers ; and we have the reference to the protection of property, while resolution 13 provides that the cars shall be used exclusively for the conveyance of passengers.

The qualification appended in the agreement aids this construction, because the privilege that is not to be infringed by the regulations is the right to use the streets.

The statute also has an important bearing.

The power given to municipalities by section 14, to take part in arrangements for the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstruction or impeding of the ordinary traffic, is only by agreements made between the municipalities and the company, and not by any legislative act of the municipal council.

There is to be joint action to guard the ordinary traffic from being impeded by the railway ; and under section 15 the municipalities alone are empowered to save the railway from being obstructed by the ordinary traffic.

The statute does not vary the agreement, but it supplements it by the provisions of section 14.

The agreement would, I apprehend, have to be interpreted consistently with the statute if there was ambiguity in its terms, and could even be construed to give powers at variance with those conferred or recognised by the statute. There is no conflict; but it must not be forgotten that the confirmation of the agreement by the statute did not extend it to any lines but those to which it always applied. The only power to make agreements respecting new lines, was the power expressed in the statute, and that power could not be exceeded by assuming to place the new lines under the original agreement.

The details mentioned in section 14, all of which I have not spoken of, deserve to be further noticed. They seem to me decisive against the power of the Municipal Corporation to control any of the operations of the company, except under a joint agreement. These details include the construction of the railway, its location upon the streets, the pattern of rail, the time and speed of running of the cars, the amount of license to be paid, the amount of fares to be paid by passengers, the time within which the works are to be commenced, the manner of proceeding with the same and the time for completion, besides the general heads of the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic. They also include several things which are not, as a rule, undertakings of the company, but which are calculated to interfere with its operations, viz: the paving, macadamising, repairing, and grading of the streets, the construction, opening and repairing of drains and sewers, and the laying of gas and water pipes.

These details were not overlooked in the arrangement of 1861, nor were the general heads of the safety and convenience of passengers, the conduct of agents and servants, and the ordinary traffic, but they were dealt with as matters of agreement, not of unilateral regulation.

The regulation promulgated by by-law 1264 is, in my view of the power of the council, wholly unauthorized, even

assuming what is not proved, that all the new roads are governed by the terms of the original agreement.

It is a direction to the company as to the mode in which it is to conduct its business, a matter which, if the council can meddle with it at all, must be the subject of a joint agreement.

The claim on the part of the city goes almost the length of asserting an absolute discretion in the council to attach new obligations and new restrictions to the conduct of the business of the company, by declaring them to be necessary for the protection of the citizens.

The liability of such a power to abuse and to be used oppressively proves the wisdom as well as the importance of the limitations which I deduce from section 14 of the statute.

The limitation is, in my opinion, twofold. First, as to the subject matter, which is the protection of the general public and not the safety and convenience of passengers; and secondly, the nature of the regulations, subject to which the company is to "operate the railway and cause the same to be worked." These are not, as I read the provisions, to require the company to do anything in the way of construction, or in the working of its cars or fulfilling its duties to its passengers; but only to submit to what the council may think it necessary to do, such perhaps as closing a gate across the track when there is danger, or to obey such directions as to come to a stop at certain crossings, or to hang a bell to every horse's harness.

This construction is, moreover, entirely consistent with what one would naturally suppose to have been in the minds of the contracting parties. The details affecting every department of the enterprise having been arranged by the mutual agreement of Easton and the council, and carefully set down in the deed, it would be a surprise to find that one of the parties to the contract had been intentionally invested with power to impose at discretion new terms looking to the interest of the party framing them, for the public and the council are one party in this matter,



and which may be unreasonable, onerous, or unfair towards the other.

A large proportion of the evidence given for the plaintiffs was for the purpose of shewing the propriety of the regulation.

It did not bear on the motives of the council in passing the by-law more directly than as a basis for a claim of a posteriori reasoning.

What was arrived at was, I think, rather to convince the Court that the regulation was not unreasonable.

There would be no object, in the view I take of the regulation itself, in entering upon an examination of the evidence in detail.

The greater part of it was addressed to the subject of the safety and convenience of passengers, and quite as much to the convenience as the safety.

Witnesses give their ideas of what passengers would gain if there was always an attentive conductor at hand to render such services as reaching out his hand to keep them from stumbling as they walk up the car, or to assist, as they get on or off, the very old and the very young, the feeble of any age, and the lady encumbered with parcels. The opinions given are now and then illustrated by the narration of incidents from the observation of the witness. These are, with some exceptions, of a nature inseparable from this kind of travelling, and familiar to the experience of people who ride in two-horse cars with a conductor as well as of those who use the one-horse vehicle.

I do not in the least doubt the sincerity of the witnesses or the goodness of their motives, yet the evidence on this particular topic seems to me, on the whole, of so fanciful and impulsive, not to say sentimental a character, that although made to do service for presentation to the Court, I can hardly imagine a body of business men, whether the directors of a company or civic functionaries, seriously considering it as a basis for practical action in the conduct of a commercial enterprise.

The protection of the general public, though not so



prominent a topic as the alleged grievances of the passengers, is not overlooked in the examination of the witnesses. The danger suggested is, that people may be run over when the driver's attention is given to the inside of the car. It is shewn that on six or seven occasions, three of them being since the passage [of the by-law, coroners' juries have recommended that every car shall have a conductor as well as a driver, but what range of inquiry led to these suggestions is not shewn.

A record of accidents is kept by the company, and it happens to shew that more than a fair proportion are chargeable to the two-horse cars, the inference from which fact is not weakened by Mr. Lefroy's suggestion that drivers of one-horse cars have inducements not to report every accident, unless we assume without any evidence that there have been accidents which have not been reported.

Evidence is given on the part of the defendants, apparently of great weight, that for reasons which the witnesses explain, the one-horse car is attended with less danger than the larger and heavier vehicle, though the one has a conductor and the other has only one man to do all the duty. After reading it all, I have no idea that upon the question of the comparative danger to persons in ordinary use of the street, from one kind of car or the other, it could be reasonably held that the one-horse car was the greater source of danger; while I take the proposition, which was so much laboured, to be self-evident, namely, that accidents will be more likely to be averted by the vigilance of two men than of one.

All this goes, however, only to the reasonableness of the regulation, if its reasonableness can be inquired into, in case the council had power to impose it.

We are not concerned with the question, whether it was passed, as one alderman tells us it was, under pressure from the Knights of Labour, or from an intelligent apprehension of its necessity, provided the council had the absolute power which is claimed, but which in my opinion they do not possess.

There is another important aspect of the case.

The one-horse car is shewn to have first come into use some years after 1861, and to have been very generally adopted in the cities of the United States and Canada. Persons competent to speak on the subject describe its advantages, as well as the extent to which in New York, Philadelphia, and other cities it almost monopolises the traffic, not in outlying or thinly populated districts, but in the most crowded thoroughfares. They inform us that the most invariable practice, in the ordinary use of the car, is to employ but one man whether he is called driver or conductor; that what is now insisted on by the city council of Toronto is unknown elsewhere; and that no physical impossibility stands in the way, and the form of the one-horse car in use here, which is not a bob-tailed car, would afford accommodation for a conductor, yet on commercial grounds it is out of the question.

The fair result of their evidence, which is not met by any contradiction, is that if these cars are to be used at a profit and not at a loss, they must be worked by one man and not by two.

It is further made clear by evidence which is not rebutted, that the only feasible way of opening up the new routes in the city as they were pressed for by the citizens, and urged on the company by the council, and the only way ever contemplated, was by means of these one-horse cars. These routes were not opened simultaneously, but one would be opened and run by the one-horse car, and application made to the council for another which would be run in the same way.

The King street line, which is usually run with single horse cars, was not opened until 1874. Part of it had been authorized in 1861, and part as late as 1874.

Each car, as procured, was numbered according to agreement, and the license fees paid every year, the number licensed rising from 28 in 1878 to 125 in 1887 and 140 in 1888.

The stipulation that the cars should be constructed in the most modern style, applied to the King street line, and

to every other line to which the terms of by-law No. 353 were made applicable.

A list, which is in evidence, shews the purchases of one-horse cars from 1874 when they were first introduced, to 1885, seventy-three within that time.

I think the proper construction of the dealings between the council and the company is, that to employ the one-horse car never was in violation of any agreement expressed or understood. On the contrary, I am inclined to think, though I do not look on it as free from all doubt, that the city might have availed itself of the improvement effected by the invention of that style of car, and insisted on its adoption by the company whenever new cars were required.

I further think that each agreement or permission for the construction of a new line of railway, must be taken to have been made in contemplation of the mode of operation actually in use, nothing to the contrary appearing.

It was in effect a grant of the right to work the line in that manner, and by-law 1264, even assuming jurisdiction in other respects, is an infringement of the privileges so granted.

I am of opinion that we should allow the appeal with costs, and dismiss the action with costs.

OSLER, J. A., dissented.

*Appeal allowed with costs ; and action dismissed with costs.*

## HURD v. THE GRAND TRUNK RAILWAY COMPANY.

*Railways—Negligence—Duty of railway company as regards animals trespassing.*

By the negligence of the plaintiff's servants, his horses escaped upon the defendants' line of road at a farm crossing, not far from an open overhead bridge on the track. Some of them were astray upon the track. While being driven back towards the crossing by the persons in charge, a train approached, which drew up for a time, the rear cars being on the crossing, and then the track being clear the engine driver sounded the whistle for brakes off, and proceeded. The horses, or some of them, had then come nearly abreast of the engine, but, alarmed by the whistle and motion of the train, they turned and ran on towards the bridge. They got upon the bridge before they could be stopped, and some had their legs broken by getting them between the ties, and others jumped over the sides and were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was no evidence that the engineer had acted recklessly or wantonly in proceeding with the train :

*Held* [reversing the judgment of the Queen's Bench Division], that the defendants were not liable ; there was no evidence of negligence in the manner in which the train was started ; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engineer to wait until the horses had been entirely driven off their premises.

*Auger v. The Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165, considered.

*Campbell v. The Great Western R. W. Co.*, 15 U. C. R. 498, observed upon and distinguished.

THIS was an appeal from the judgment of the Queen's Bench Division, pronounced on the 23rd of December, 1886, whereby an order nisi obtained by the defendants and a motion made by them to set aside the findings of the jury, and the judgment entered thereon for the plaintiff, and to enter a nonsuit or judgment for the defendants, or for a new trial, were respectively discharged and dismissed with costs.

The case was tried before O'Connor, J., and a jury, at the Hamilton Spring Assizes of 1886, when a verdict was given and judgment entered in favor of the plaintiff.

The action was for negligence on the part of the servants of the defendants, whereby several horses, the property of the plaintiff, were killed and others seriously damaged on the defendants' railway between Hamilton and Toronto, a little to the east of the wooden overhead bridge near the

Waterdown station. The locality may be described as follows: The plaintiff's farm crossing is to the north of the railway track, and is 1,460 feet east from the Waterdown station overhead bridge in the direction of the railway bridge. The railway over the bridge to the east, which is over the highway, and where the accident happened, is 1,196 feet to the east of the farm crossing. It is an iron girder bridge  $32\frac{1}{2}$  feet in length, 14 feet wide. There are wooden ties about from 8 to 10 inches apart, and the height above the highway is  $12\frac{1}{2}$  feet, and above the culvert on the highway about 15 feet.

The train which did the damage was going east from the direction of the Waterdown station.

One of the witnesses, Caleb Fonger, who was in the plaintiff's employ, said he had 16 heavy draught mares in charge that day; that they were in pasture on the south side of the track, and he was told to drive them by the farm crossing to the north side. Robert Bell, another witness was assisting. Bell went ahead to open the farm gate on the other side, then he opened the south gate, at which time the horses were about 150 yards from the south gate; Bell then stood at the Waterdown or west side of the crossing, and he (Fonger) drove the horses on to the farm crossing. One of the horses then turned east in the direction of the bridge where the accident happened, and the rest followed; no train was then seen or heard; when the horses turned along the track Fonger went across the fields to head them; he did not see the train coming till he got on to the track [again near the bridge: that is the bridge where the accident happened, and the train was then up by the west or wooden bridge. The train stopped about half way between the two bridges, that is the west and east bridges, not far from the farm crossing; Fonger was then driving the animals back towards the farm crossing and towards the train upon the north side of the track; and continuing, Fonger said: "When I got them up pretty near to the train the whistle sounded and that started them and scared them back of me; it was a pretty



sharp whistle. The train then started right up, and it went on till it got within twenty or thirty feet of the bridge, the horses got on to the bridge; four of them fell over; three of them were killed; the others were all damaged pretty bad; they were stuck in the bridge, their legs got down between the sleepers and so on. The horses were going along very good as I was driving towards the locomotive; the whistle turned them, the train might have stood two or three minutes before blowing the whistle. I suppose there were twenty or twenty-two cars in the train; Bell was at the crossing when the whistle was blown, it was between seven and eight in the morning; if the whistle had not been sounded the horses would have been past the locomotive in about a minute."

The appeal came on for hearing on the 9th of February, 1888.\*

*McCarthy*, Q.C., and *Wallace Nesbitt*, for the appellants. The evidence shews and it is admitted by counsel that the horses were unlawfully trespassing on the railway, and the learned Chief Justice in the Court below distinctly says the plaintiff's servants had been guilty of gross negligence in their management of the horses. All the important circumstances are agreed upon in this case and the questions to be determined upon the admitted facts are: (1) What were the duties of the railway company and their servants under these facts; and (2) was there such a breach of those duties as to make the company liable for such damages as have arisen. Under the facts here appearing, it is contended that the plaintiff, to entitle him to recover, must shew on the part of the defendants' employés, wanton and reckless conduct in the management of the train, to render the defendants responsible for any loss or damage. Here there can be no question that the persons in charge of the train acted according to the best of their judgment, and evinced every desire on their part to avoid any damage or loss to the plaintiff.

*Robinson*, Q.C., and *Lazier*, for the respondent. There is no ground here to ask the Court to enter a nonsuit; there

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

was no doubt ample evidence to go to the jury and quite sufficient to support the verdict given by them. The learned Judge at the trial would not have been warranted in withdrawing the case from the jury. Admitting, for the sake of argument, that the plaintiff had been in fault in not having provided a man to stand at either side of the crossing while the horses were being driven across the track, it still resolved itself into a question whether the exercise of ordinary, reasonable, and proper care by the defendants would not have avoided the accident.

This, the main, if not the only question to be determined was distinctly left to the jury; they have found upon it, and the evidence sufficiently sustains their verdict. The evidence shews distinctly that at the time of the accident there was not any ground for imputing the slightest degree of negligence to the plaintiff; although prior thereto he may be chargeable with some slight acts of negligence; on the other hand the defendants were at the time guilty of such acts of negligence as caused the injury, and which is directly attributable thereto.

*Wallace Nesbitt* in reply.

The other points raised, and the cases cited are, with others, mentioned in the present judgments.

May 1st, 1888. HAGARTY, C. J. O.—The facts of the case stated by the learned Chief Justice of the Queen's Bench, very clearly shew the particulars of the accident. The statement is very fair towards the defendants, and down to the actual decision wholly in their favor.

He shews how the horses got upon the track by the gross neglect of plaintiff's servants. They were seen by the engine driver, and the train was, as he says, slowed down; as plaintiff's witnesses say, it was stopped. Then the plaintiff's man turned the horses back, and as they came along towards the train, and the foremost abreast or nearly abreast of the engine, but none of them being on the track, the space between the railway fences was 150 feet, the engineer thought the horses were out of danger, and see-

ing them on the north side of the track, and that the track was clear, whistled off brakes and went on. The horses then turned, frightened as is said by the train and the whistle, rushed down to the open bridge and were killed or injured therein. The train was pulled up before coming to the bridge, and never touched the cattle.

The man who drove them back says he did not expect any accident till just before the train got to the bridge, when the horses made a rush over into the bridge.

The Chief Justice says: "The man in charge of the horses said throughout that he did not expect an accident to happen, and so also did the engineer, and if the jury had found for the defendants I would not have been disposed to disturb the verdict. But the jury upon the whole case found the defendants' officers did not act judiciously in the management of their train, and it seems almost certain that if the engineer had delayed his train for two or three minutes longer, from the time when the horses were abreast of the engine, no accident would have happened. The train was in no peril at the time, and that short time might well have been spared to the horses. It is a hard case, for the damage has been caused by the great negligence of the plaintiff's own servants, and by something like a mere error of judgment at the most on the part of the defendants' own engineer, but the jury have determined it and I cannot say they have wrongfully done so."

I must say with much respect, that in the view of the evidence thus expressed, I should have confidently expected a judgment against the verdict rendered by the jury.

I am not able to see the similitude which is urged between this case and the donkey on the high road.

It is clear that in such cases, whether as regards man or beast, it is the duty of every one to avoid, if possible, injuring either if it can be avoided, and this duty is not excusable because the object injured is not on or using the highway in a reasonably proper manner. Because a man is driving on the wrong side of the road or a hobbled donkey is left thereon, it is no excuse for injuring it if the injury can be reasonably avoided.

We have seen it remarked that the driver on a high road or street, has volition and may be able to avoid anything on the road, but the railroad driver has limited power and can only drive on the rails.

It is impossible to overlook the fact that, in such a case as that before us, the defendants were using their ordinary powers in running trains at high rates of speed on their own enclosed road, and that in the ordinary stopping or starting of the trains, or when the pressure attains a certain height the steam is blown off and very loud and disturbing noises are inevitably caused. There was nothing on their track with which they could come in contact—they did not run against anything.

A herd of horses had, by the wholly wrongful neglect of plaintiff, trespassed on their enclosed road; they had been turned back from the open bridge, and came down abreast of the engine. The driver, seeing his track ahead clear, pushed on his train, whistling for brakes off as he did so, and for this whistling his employers are held responsible for the horses taking fright and rushing back to the open bridge, and there damaging themselves.

I am wholly unable to believe that any case was made out to be submitted to a jury to find against the company. I see nothing whatever to support the charge of breach of duty by negligent or careless management of their train. It may be quite true that if the whistle had not sounded the horses might have passed the train in safety. But the engineer considered that the rear of his train was still on the farm crossing and that he could safely proceed. His being possibly mistaken as to this cannot, I think, in the absence of any wanton or reckless conduct on his part, create a liability. Had his opinion proved right by the result and no damage been occasioned, all would agree there was no negligence. Because he had miscalculated the extent of the horse's nervousness, and damages resulted does his conduct therefore amount to actionable negligence?

The witnesses, in the usual fashion, judge by the result, not by the intrinsic carefulness or carelessness of the act.



This is one of the strongest illustrations that I remember of the post hoc, propter hoc doctrine.

I presume that the plaintiff would argue the company would have been equally liable if the horses had rushed past the train and been injured at the narrow farm crossing, or if in their fright they had hurt themselves in trying to escape by jumping the side fences; and it would not require much extension of the plaintiff's argument, to make the defendants liable if the same herd of horses in the adjoining field had, in consequence of the rush or whistling of the train, injured themselves against the fences of their enclosure.

The case is wholly different as I view it, from a collision with or running down of the horses on the track. The track was open and unencumbered, there was ample space on each side of the rails, and I can see no breach of duty or actionable wrong by act of the engineer in deciding to go forward and giving the usual signal therefor, under the circumstances in evidence.

I accept the test so often laid down, and consider that on this evidence no twelve reasonable men could properly find a verdict for the plaintiff.

As has been said: "It would place in the hands of jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever." 3 App. Cas. 197

In *Fullarton v. Manchester South Junction &c., R. W. Co.*, 14 C. B. N. S. 54, the plaintiff's carriage was waiting, with others, to pass the railway track at a level crossing while the gates were shut. The engineer at starting, whistled and blew off the mud cocks or taps in front of the engine, throwing out a large volume of steam, which extended through the gates towards plaintiff's horses. They took fright, and they and the carriage were much damaged against a wall. There was evidence that it was quite unnecessary and unusual to relieve the cylinder by blowing off from the mud cocks at this level crossing. Erle, C. J., on appeal held the company had



been rightly held liable, that plaintiff's horses were using the high road as of right, and the defendants had exercised their right of crossing the highway in an inconvenient and improper manner.

In this Court in *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482, it was held, that plaintiff could recover for damage done to the carriage, the horses taking fright at a passing train, the defendants having omitted to ring or whistle on approaching a crossing, which would, if given, have warned the plaintiff not to approach too near. The judgment was based on the breach of duty imposed by statute for the protection of the public.

These are the only cases referred to as damage, not by collision, but from animals taking fright as here.

In *Degg v. Midland R. W. Co.*, 1 H. & N. at 781, Bramwell, B., delivering the judgment of the Court remarks :

“The law, for reasons of supposed convenience, more than on principle, makes a master liable in certain cases for the acts of his servants, not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, where damage is thereby done. This is a responsibility the law has put on them, there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit ; but why should a wrongdoer have power to create such a responsibility and such a duty ? No reason can be assigned. Some acts are absolutely and intrinsically wrong, such as a blow, others only so from their probable consequences. There is no absolute or intrinsic negligence ; it is always relative to some circumstance of time, place, or person.

\* \* It seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty.”

In that case, the injury was caused to deceased by his volunteering to help defendants, servants to move a truck at their station, which truck was struck by another truck by the negligent running of one of the defendants' engines.

In *Singleton v. Eastern C. R. W. Co.*, 7 C. B. N. S. 287, two children, three and half and five and a half years old, by some means got on the defendants' track, and were sitting on the parapet of a small wooden bridge on the railway when a train came up, and in passing cut off one of the children's legs. "It appeared the train was coming up an incline and the driver saw the dangerous position of the children, but made no attempt to stop the engine contenting himself with merely turning on his whistle."

There was no evidence to shew how the children got there, it was supposed they had got through the fence at a place where a rail was off. There was a nonsuit by Erle, C. J., with leave to move, and in term counsel urged that there was negligence on the driver's part in not stopping when he might have done so, and also as to the fence. Erle, C. J., said the plaintiff was wrongfully upon the railway \* \* I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company." Williams, J. said: "I also think there was no negligence made out on the part of the railway. All was mere conjecture and surmise." Rule refused.

This case certainly goes further than I supposed. It is cited in the text books. The only comment I have seen is in *Pollock* on Torts, at p. 383, in a note, "It was decided on the ground (whether rightly taken or not) that there was no evidence of negligence at all." It is cited without comment in *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 159, a case of somewhat similar character.

In *Auger v. Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165, the track was unfenced. Horses were on the track. Two of them running ahead of the train were caught in a culvert and killed by the engine. There was the usual contradictory evidence as to what could have been done and ought to have been done. Steam was shut off, speed slackened, and whistle blown. On whistling the horses ran off the track, speed was then increased, they ran on again and two were caught in a culvert. The engineer again called for breaks, it was a down grade and the train

could not be stopped till the horses were killed. It was objected that the horses were unlawfully on the track, and that the defendants were not liable even if there was unskillfulness and negligence. Draper, C. J., reserved leave to move. It was left to the jury to find if the horses were killed by negligence or unskillfulness in managing the engine. The jury found for plaintiff.

After argument in term Richards, C. J., delivered the judgment of the Court making the rule absolute for a nonsuit: "If it be admitted that under the decided cases the horses were not lawfully on the railway, without declaring that that circumstance would authorize a verdict for the defendants in all cases, I do not think we would be justified in holding that the facts proved at the trial, taken in their broadest sense against the defendants, shew that they were guilty of negligence in relation to those horses which were wrongfully on their railway."

Reference was made to *Ricketts v. East and West India Dock Co.*, 12 C. B. 174, where Jervis, C. J., says:

"The next question is, in what respect does the statute vary the ordinary common law liability? It seems to me that so far from varying the responsibility of the defendants, the statute has most properly taken the common law rule as the measure of their liability"; this was said in reference to fencing against adjoining lands.

The Chief Justice also said, that it was not law to insist that the dangerous nature of the trade cast on defendants an obligation to adopt more than ordinary precaution. Cresswell, J., says that *Rex v. Pease*, 4 B. & Ad. 30, was a strong authority to shew that the Legislature having legalised railways, they are not subject to any liabilities beyond the ordinary common law liability except where the Legislature has thought fit to impose it.

In *Sharrod v. London and North Western R. W. Co.*, 4 Ex. 580, sheep had got on the line; the driver had instructions to drive at a certain rate per hour. It was supposed that while going at that rate in the dusk of evening the driver could not have seen the sheep in sufficient time to

avoid collision. Leave was reserved. Other points were involved. In giving judgment, Parke B., said :

“If the cattle were altogether wrongdoers, there has been no neglect or misconduct for which defendants were responsible.”

Mr. Robinson, relied on the case of *Campbell v. Great Western R. W. Co.*, 15 U. C. R. 498 (1857.) The facts there were much stronger against the company. The horses were seen by the driver on the track, the train had just stopped to drive some cows off the road and “as they were moving off again they saw plaintiff’s colts on the track in front about 250 yards off; the whistle was sounded, the colts ran on before the train till they got to a concession line, where a cattle guard stopped them. No signal was given to apply brakes, and from the time the train was started the speed continued to increase notwithstanding the colts were just before them, and notwithstanding the uncertainty whether they would get out of the road or not.” They were killed. The verdict was upheld. Mr. Justice Burns said, that, “the evidence tends to establish a desire rather to run them down than to avoid them and this I think they were not at liberty to do.”

I am unable fully to agree with some of the remarks made by the same learned Judge, especially as to the defendants’ duty because they exercised a dangerous calling.

Bowen, L. J., says : in *Thomas v. Quartermaine*, 18 Q. B. Div. 697, “Contributory negligence arises where there has been a breach of duty on defendants’ part, not where ex hypothesi, there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connexion between the defendant’s negligence and the accident which has occurred; and that the defendant’s negligence accordingly is not the true proximate cause of the injury.”

I also refer to *Tolhausen v. Davies*, 4 Times Reports, p. 328, discussed in *Law Times*, February 25, 1888.



It appears to me that we are to deal with the defendants' position and duties as to the trespassers on their own ground on the same principles that govern the duties and liabilities of a man riding, driving, or shooting in his own park or close, and I invite attention to the whole judgment on this of Lord Bramwell in *Degg v. Midland R. W. Co.*, from which I have made a partial extract.

The general principle as to liability where—notwithstanding the negligence of plaintiff—the mischief is caused by the neglect of the defendants to exercise ordinary care in avoiding the danger, is clearly laid down in the House of Lords in *Radley v. London and North Western R. W. Co.*, 1 App. Cas. 754, and must of course govern.

BURTON, J. A.—I cannot commence the statement of my views as to the liability of the defendants in this case better than by quoting the following remarks of the Master of the Rolls, in *Heaven v. Pender*, 11 Q. B. D. 503-507.

“But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensues from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.”

If the facts of which we are now in possession had been stated in the plaintiff's statement of complaint, would that statement have been demurrable as shewing no cause of action?

It would then have been stated that the horses in question had got upon the track through no default of the defendants or their servants, but admittedly through the negligence of the plaintiff, a negligence for which the plaintiff would have been liable in the event of the train having been derailed and the servants or property of the



company injured by reason of its having come into collision with the horses.

They were wrongfully therefore on the defendants' premises.

The mere statement of a duty, if it does not arise upon the facts alleged, cannot aid the plaintiff; and when he states it was the duty of the defendants' servant when he saw the horses on the company's premises to stop the train, as stated in the 4th paragraph, he states something as a duty which does not arise upon the facts.

The 5th paragraph, if stated in accordance with the facts as we now know them, must necessarily have omitted the averment that the horses were being driven lawfully and properly by the plaintiff's servants; they were then unlawfully, not upon the crossing, but upon another portion of the track, and being so there what is the allegation of duty and the breach of it, which is alleged; "that before they had come up to, and when they were within a few yards of the said locomotive and freight train, the said servants of the defendants negligently and carelessly, and without exercising due and proper care, again sounded the said locomotive whistle with great noise and shrillness, and started on the said locomotive and freight train at its usual speed towards its destination, and in the direction from which the said horses and mares were then being driven by the plaintiff's said servants, and proceeded on its way?"

It is then alleged that by reason of the omission to stop the train, and in sounding the whistle at the time and in the manner in which it was sounded, the horses became frightened and uncontrollable and ran back along the track and over a bridge, and were killed or otherwise greatly injured.

If the plaintiff's claim had been thus stated, I think, with great submission, that it would have been bad upon demurrer, on the ground that there was no such duty as alleged due by the defendants to the plaintiff.

I do not think that this at all conflicts with *Campbell v. The Great Western R. W. Co.*, 15 U.C.R. 505. Here the particular breach of duty complained of is alleged, and we cannot avoid seeing that no such duty under the circum-

stances exists. If it had been alleged that, although the defendants knew the danger and either recklessly ran over the horses or drove them recklessly or intentionally to a place of danger, where injury was almost inevitable, the statement would have disclosed a cause of action. The evidence to make the defendants liable should be equally cogent, and I think there was no evidence from which such recklessness or intentional wrongdoing could be reasonably inferred.

*Campbell's Case* was decided in 1858, and as I understand it, the learned Judge held that there was evidence from which the jury might or might not find recklessness or intentional wrongdoing on the part of the defendants' servants.

*Auger v The Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165, was decided two years later, and the law on the subject is more fully discussed and the decision is much more in accordance with the view I am now expressing.

*Sharrod v. The London and North Western Railway Co.*, 4 Ex. 580, is referred to in that case, and I quote from it the following remarks from Parke, Baron, in giving judgment :

"If, in the present case, the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy by action on the case against the company for driving the engine in such a way as to injure that right; for the defendants were bound to see that their carriages did not travel at such speed as to make it impossible to avoid other persons who had a lawful right to be there. If the cattle were altogether wrongdoers, there has been no neglect or misconduct for which the defendants are responsible."

The question of negligence is ordinarily a question of fact, and therefore ought to be submitted under proper instructions to the jury. When the measure of duty is ordinary and reasonable care, and the degree varies according to circumstances, the question cannot from the very nature of the case be for the Court, but must be submitted to a jury.

But where the precise duty is alleged and the material facts are undisputed, as for instance in this case that the horses were improperly on the defendants' road, and the breach of duty relied on is the fact that the engine driver did not stop his train at once on seeing the horses, and that he whistled at a particular time, although such whistling is shewn to be the usual signal for putting on or taking off brakes, the question I apprehend is for the Court. Did the defendants owe any *such* duty to the plaintiff?

If it were shewn that a passenger voluntarily left his seat in a railway carriage, and chose for his own convenience to stand upon the platform, and then by a sudden jolt of the cars was thrown off and injured, that would, I should say, be, per se, negligence disentitling him to recover, and there would be no question for the jury.

One not unnaturally sympathises with the plaintiffs in the heavy loss they have sustained, and it is not improbable that if we are driven to the conclusion that there is any evidence which ought properly to be submitted to a jury they will succeed in obtaining a verdict against the railway company as often as the case is tried; but we shall be assuming a very grave and serious responsibility, and shall be imposing upon railway companies a very unreasonable addition to their ordinary risks and liabilities, if we hold that in this case there was any evidence to go to the jury of want of ordinary care and diligence on the part of the company.

The first and paramount duty of the company is to their passengers. They regulate the general speed of their trains on the assumption that they will find the track free from obstructions. If they are to bring their train to a standstill every time they meet with cattle trespassing on the track, they would, in effect, be subjecting the management of their road and the persons and property in their charge to the control of wrongdoers, and holding out a premium to them for wrongdoing, and greatly increasing the chances of collision.

The ordinary means employed to drive cattle from the track is that which is complained of here, the use of the whistle, and that is generally sufficient.

There is no evidence that the engine driver was not competent, and much must necessarily be left to his discretion, having in view the necessity of avoiding other trains, which may be running about the same time.

No doubt the company ought to be held responsible for the employment of competent men, and should be responsible that they act in good faith and with common prudence, and they should be held to the exercise of such care and diligence, having due regard to the paramount obligation to which I have referred, to avoid unnecessary injury to property, even though it is improperly on their track.

The mere fact that the train was not brought to a standstill does not in itself shew any want of ordinary care, and the act of whistling, which was necessary as a signal to the brakeman, ought not, in my opinion, to be regarded as evidence from which a jury might reasonably infer a want of reasonable care under the circumstances of this case, even though the engine driver may have erred in judgment in whistling at that particular moment.

I think we should be laying down a very dangerous rule were we to hold that a wrongdoer could maintain an action against a railway company on such evidence as was given in this case, and I therefore am of opinion that the appeal should be allowed, and the action dismissed, with costs.

PATTERSON, J. A., concurred.

OSLER, J. A.—I think the evidence fails to shew that the defendants' driver was guilty of any breach of duty in blowing the whistle and starting his train when he did. The line was clear, and unless (which is absurd) the driver was bound to wait until the horses had been driven off the defendants' premises, so as to avoid altogether the risk of frightening them, I cannot see that he was guilty of negligence, that is to say, of a breach of any duty he owed to the plaintiff, in proceeding on his journey. There is not the least suggestion that the whistle was blown for any

reason other than that it was a usual and necessary act in starting the train.

I have had an opportunity of reading the judgment of the learned Chief Justice and concur generally in his reasons for allowing the appeal.

*Appeal allowed, with costs,  
and action dismissed, with costs.*

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## O'MEARA V. CITY OF OTTAWA.

*Municipal Corporations—Municipal Act 1883, sec. 503, sub-s. 6—By-law.—Sale of fresh meat.*

By section 503, sub-sec. 6 of the Municipal Act of 1883 a corporation has power, by by-law to prevent the sale of fresh meat in quantities less than a quarter carcase except by a person holding a license and in such place as the council may specify, and

*Semble*, per OSLER, J. A.—The same construction would have been placed on the statute law as it stood before the Consolidated Act of 1883.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division reported 11 O. R. 603, where the facts are fully stated, and came on for hearing on the 29th of March, 1887.\*

*McCarthy*, Q.C., and *Clement*, for the appellant.

*J. MacLennan*, Q.C., for the respondents.

May 10, 1887. HAGARTY, C.J.O.—I have come to the conclusion that the judgment of the learned Chief Justice Wilson is right, and I adopt the reasons on which he founds it.

That judgment so fully sets out all the facts and documents to be considered that it is unnecessary to repeat them here.

It seems clear that the corporation were fully authorized to pass this by-law under the express powers given by sec. 503 as to the place and manner of selling fresh meat in quantities less than a quarter carcase. The whole objection seems to resolve itself into this, that the powers given by this sec. 503 are to be exercised "subject to the restrictions and exceptions contained in the six preceding sections." It is conceded that only sub-secs. 4 and 6 of sec. 497 affect the argument.

The by-law dealing wholly with quantities under the one-quarter carcase prohibits exposing for sale or selling except in the specially named places and under a license.

\**Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

As already stated they would be unquestionably allowable under sec. 503.

But sub-sec. 6 of sec. 497 declares that after a named hour in the morning any person may proceed to sell any article he has been exposing for sale in the market place, but having paid the market fee he may proceed to sell it elsewhere. This is the main objection to the by-law, and it is said that it is bad, as practically doing away with this special privilege.

Now, it is to be remarked that with the exception of the weighmaster's charges (sub-sec. 8 of sec. 497) there is no mention of fresh meat either in large or small quantities in any of these six preceding sections, and there only as "weighing slaughtered meat or grain under 100 lbs."

In these sections there is a maximum tariff for articles brought to market in vehicles of different kinds, or in baskets; and on cattle, &c. All restrictions of this general character in these sections may be held to apply.

But the Legislature has thought proper to give very special powers as to the retail trade in fresh meat under a named quantity, treating it as a special article in its nature requiring special legislation, and enable the council to require a license therefor, specifying a charge for such license and express powers of prohibiting the sale except under the license and at the authorized place; and I think we are bound not to neutralise the express powers given as to this article by applying to its sale previous provisions which, as I think, are inconsistent with such express powers.

It seems impossible to fully exercise the powers of sub-sec. 6, sec. 503, enabling them to fix and regulate the places where fresh meat less than one-quarter carcase can be sold, and to prevent the sale "except by a person holding a license and in a place authorized by the council," if we hold this to be controlled by sub-sec. 6 of sec. 497.

To allow hawkers or retailers of fresh meat, after coming to the market and paying the fee, to leave it after 9 A.M. and hawk the meat for sale over the city, would, I

think, wholly defeat the special powers given advisedly by the Legislature.

We must endeavour to ascertain if possible the true intention of the Legislature to be gathered from the language used, and we must not allow that intention, when apparent, to be defeated by any general and rather inartificially expressed exceptions, such as sec. 503 is prefaced by. The "restrictions and exceptions" contained in the six preceding sections may be properly held to apply where not clearly opposed to the express powers subsequently given.

A recent case in the Privy Council (*Salmon v. Duncombe*, 11 App. Cas. 634,) shews how far a Court should go to prevent the manifest object of a statute being defeated by words inopportunately inserted. The judgment says: "It is a very serious matter to hold that when the main object of a statute is clear it shall be reduced to a nullity by the draughtsman's unskilfulness or ignorance of law. It may be necessary to come to such a conclusion, but their lordships hold that nothing can justify it except necessity or the absolute untractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the Legislature; and, secondly, whether the last nine words of sec. 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular."

This case goes much further than we need travel in the case for judgment. I have no doubt whatever, on reading all the clauses bearing on the point, but that it was the intention of the Legislature to give full power to the municipality to regulate absolutely as to time and place the sale of fresh meat under a one-quarter carcase.

With that conviction I have to see whether it is necessary to qualify that absolute power by the reference to the restrictions and exceptions mentioned. I think all reasonable effect can be given to them without nullifying the express powers as to the retailing of fresh meat.

All the general restrictions as to the maximum of market fees, the fees for weighing, the exemption of specified

articles, the delivery of articles in pursuance of a prior contract carried directly to the place of delivery—in fact, all the restrictive provisions as to hours, &c., except when, as here, this would clash directly with the express control afterwards granted as to fresh meat by retail.

I consider sub-sec. 4 as to delivery on a prior contract is not affected by this by-law.

I think on the whole the judgment of Wilson, C. J., is right, and should be upheld.

I have not thought it necessary to examine the former Acts, as all has to depend on the Consolidated Act of 1883.

PATTERSON, J.A.—After considering, in conference with my learned brothers, the several clauses of the statute, 48 Vict. ch. 18, on which the objections to this by-law are urged, I have a very clear opinion that whatever force those objections at first sight may have appeared to possess arose from a want of close attention to the terms of the clauses themselves.

It cannot be questioned that the by-law is in all respects within the power conferred upon the council by sub-sec. 6 of sec. 503, if the provisions of that sub-section are not controlled or modified by something else. The contention is that they are controlled by the enactment of sec. 503, which makes all the powers given by that section subject to the restrictions and exceptions contained in the six next preceding sections, and that in sec. 497, sub-sec. 6, there are restrictions and exceptions which this by-law ignores.

I do not find in sec. 497 any restrictions or exceptions touching the subject matter of this by-law, or of the sub-section under which it was passed.

Sec. 497 deals with the subject of markets and market fees, sub-secs. 7 and 8 fixing the maximum rates to be imposed by any municipality on articles brought to the market place in vehicles or by hand, or in any basket or vessel, and on live animals, and for weighing or measuring specified articles, including slaughtered meat. Sub-sec. 6 relieves any person who has paid the market fee on or in respect of



any article or the vehicle in which it is contained from being compelled to remain on the market place with the article he has brought to market to sell after the hour of 9 or 10 A.M. between named dates.

Now sub-sec. 6 of sec. 503 does not deal with articles brought to market and subject to market fees in the sense with which sec. 497 is occupied. It gives power to grant licenses for selling fresh meat in less quantities than by the quarter carcase, in fact, to carry on the retail trade of a butcher, and to prevent the carrying on of that trade except under license and in a place authorized by the council. That place may or may not be within the four corners of a market, but whether it is or not the subject is quite outside of any of the rules laid down by sec. 497 as I understand the matter.

I agree, therefore, that the appeal should be dismissed.

OSLER, J.A.—I am of opinion that the judgment appealed from is right. Sub-sec. 6 of sec. 503 was introduced into the Municipal Act, R. S. O. ch. 174, by 42 Vict. ch. 31, sec. 20, (1879), and conferred upon the council power to legislate specially in respect of one particular matter, namely, the sale of fresh meat in quantities less than by the quarter carcase.

They may (1) grant licenses for such sale; (2) may regulate the sale; (3) may fix and regulate the places where such sale shall be allowed; (4) may impose and enforce payment of a license fee, and (5) may prevent the sale unless by a license and in a place authorized.

It is evident that an enactment of this kind can have no substantial operative effect if, as the appellant contends, it is governed by the words with which the section is prefaced, and therefore to be read as subject to the restrictions and limitations of sub-sec. 6 of sec. 497, with which it has hardly more connection than if it had related to the licensing of opera houses or cigar shops. That section contains a number of provisions, subject to which the council are permitted to



regulate the sale of certain articles by retail in the public streets, in effect enabling them (by sub-sec. 6), subject to certain exceptions, to require such articles to be first offered for sale in the market place, and not elsewhere before a certain hour in the morning, after which the persons bringing such articles to market may, if they have paid the market fees proceed to sell them elsewhere than in or on the market. It is contrasted with and cannot be operative at the same time with sec. 498, under which the council may establish and collect market fees from persons who use the market place voluntarily for the sale of marketable articles, but which they may if they please sell anywhere else in the municipality without charge and without being obliged to expose them for sale in the market place. I read these two sections and other sections taken from the 45 Vict. ch. 24, "An Act respecting Markets," as making general provision with respect to market fees, and not as really inconsistent with, or indeed as having a connection with sec. 503, sub-sec. 6, which was taken from a prior Act not dealing with market fees, but passed *alio intuitu*, in reference to another subject matter. The objects of these two sections, 497 and 498, are entirely different from those of 503, sub-sec. 6, the effect of the latter practically being to take butchers' meat out of the category of marketable articles for which a market fee may be charged or the sale of which may be confined to the market place up to a certain hour only, and to qualify it as an article the vendors of which may be compelled to take out a license and to confine their business to a specified locality.

This is brought out if possible more clearly if we attempt to square the provisions of sect. 498 with those of the subsection under consideration, for the force of the argument against the by-law requires that both sections shall be treated as restrictions and limitations upon sub-sec. 6 of sec. 503, by virtue of the first clause or preface of that section.

I think that clause has its full operation when limited to the sub-secs. of sec. 503 other than the 6th and 12th, and that the construction I have indicated is that which

would have been placed upon the statute law as it stood before the Consolidated Act of 1883.

On these grounds I would dismiss the appeal.

BURTON, J. A., concurred in dismissing the appeal.

*Appeal dismissed, with costs.*

[Affirmed by the Supreme Court.]

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### COATS V. KELLY.

*Fraudulent preference—Assignment for benefit of creditors—48 Vict. ch. 26 (O.)—Non-retrospective operation of.*

One Chamberlain being in insolvent circumstances, and indebted to K. in \$120, was pressed by him for payment when he agreed to sell K. a horse for \$110, in part payment; and about the 15th of August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st of October, Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 Vict. ch. 26 (O.) respecting assignments for the benefit of creditors, which came into force on the 1st September, 1885.

In an action against K. to recover the horse on the ground of fraudulent preference,

*Held*, affirming the judgment of the Court below, that the sale having been made before the Act came into force, the provisions thereof did not apply.

*Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed.

*Held*, also, that the sale was not void, either as a fraudulent preference under R. S. O. ch. 118, or for non-compliance with the Bills of Sale Act.

THE plaintiff sued as the assignee of one Chamberlain under an assignment for the general benefit of creditors, alleging that the defendant in fraud of the creditors of Chamberlain, and in violation of R. S. O. ch. 118, respecting fraudulent preferences, and in violation of the Act respecting assignments for the benefit of creditors, 48 Vict. ch. 26, wrongfully took, converted, and detained a certain horse the property of Chamberlain.

It was further alleged that this was done while Chamberlain was insolvent, and had the effect of defeating his creditors.

wholly or in part, and of giving the defendant a preference over Chamberlain's other creditors, and was done with such intent.

The case was tried with a jury before the County Judge of the county of Wentworth and the plaintiff was nonsuited. A motion to set aside the nonsuit, and for a new trial was afterwards discharged, and the plaintiff thereupon appealed.

The facts shortly were that about the middle of the month of August, 1885, Chamberlain being indebted to Kelly upon a store account for \$120, and being pressed by him for payment, it was agreed between them that the horse in question should be taken by Kelly at the price of \$110, as a part payment on account, and it was accordingly sold and actually delivered to Kelly on those terms. It remained in his possession for a day and was used by him, and was then lent to Chamberlain for a while to use in his business. Chamberlain continued to use it until some time in the first week of October, 1885, when it was returned to Kelly, and thereafter remained in his possession.

On the 1st September, 1885, the Act, 48 Vict. ch. 26, respecting assignments for the benefit of creditors came into force, and on the 31st October, Chamberlain made an assignment in pursuance of the provisions of the Act to the plaintiff.

There was some evidence that Chamberlain was insolvent in August when the horse was sold, but none that Kelly knew or had reason to know of it.

The appeal came on for hearing on the 22nd November, 1886.\*

*J. J. Scott*, for the appellant.

*Moss, Q. C.*, and *Campion*, for the respondent.

December 23, 1886. OSLER, J. A.—[After stating the facts above set forth,] I see no evidence of any other facts which affect the title of either party, or which casts a doubt upon the bona fides of the August transaction.

\**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

The provincial statute 48 Vict. ch. 26, already referred to by sec. 7, sub-sec. 1, professes to confer upon an assignee appointed in pursuance of the Act a statutory title to sue as representing the creditors of the assignor.

“The assignee shall have an exclusive right of suing for the rescission of agreements, deeds, and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of the Act respecting fraudulent preference of creditors by persons in insolvent circumstances, or of this Act.”

Apart from this section the plaintiff would have no ground to maintain the action as an assignee in trust for creditors; in the absence of some such authority he can only enforce the same rights as the person making the assignment to him could have enforced: See *Moffatt v. Burland*, 11 S. C. R. 76, where this question was recently considered and the rule affirmed.

The question, therefore, here is, whether the sale to the defendant is shewn to be one which could have been impeached by a creditor of Chamberlain at the time of the assignment.

The same Act of 48 Vict. ch. 26, repeals sec. 2 of the R. S. O., ch. 118, and a verbal amendment made therein by 47 Vict. ch. 10, and substitutes therefor new provisions as to the avoidance of gifts, conveyances, and transfers of property by persons in insolvent circumstances with intent to prefer. These provisions, however, have nothing to do with the case before us, though they are pleaded in the statement of claim and were relied upon in the argument, as the sale in question was made before the Act which contains them came into force, and, as the learned Judge in the Court below held they have no retrospective operation: *Ings v. The Bank of Prince Edward Island*, 11 S. C. R. 265.

The plaintiff is therefore obliged to contend that the sale was void either (1) as a fraudulent preference under R. S. O. ch. 118, as it formerly stood, or (2) for non compliance with the requirements of the Chattel Mortgage and Bills of Sale Act R. S. O. ch. 119.



I think both these objections fail. As regards the first I see nothing to rebut the inference that so far as the debtor was concerned the transfer was made in consequence of honest pressure by his creditor for payment or settlement of his demand, and therefore without intent to prefer; while on the part of the defendant the intent to obtain a preference is equally rebutted by the failure to prove knowledge of his debtor's insolvency, even if that could have made a difference.

The verbal amendment to sect. 2, already referred to, introduced by 47 Vict. ch. 10, does not appear to me to enlarge it, or to require any other construction to be placed upon it than that which has hitherto prevailed: *Slater v. Oliver*, 7 O. R. 158; *Long v. Hancock*, 12 S. C. R. 532; *Burns v. McKay*, 10 O. R. 167, affirmed by this Court.

The other objection is equally untenable. As between the parties there was a perfectly valid sale, though up to the 4th October it might possibly have been avoided by an execution creditor for want of registration or continued change of possession.

Whether such an assignee as the plaintiff can in any case take advantage of non-compliance with the requirements of the Act I do not wish now to decide. He is not in a position to do so in this case because the defendant with the assent of the assignor had retaken possession of the horse nearly a month before the date of the assignment, and it was in his possession and not in that of the assignor at that time: *Parkes v. St. George*, 10 A. R. 476; *Whiting v. Hovey*, 13 A. R. 7.

Therefore I agree with the judgment of the Court below, and think that the appeal should be dismissed.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A., concurred.

*Appeal dismissed, with costs.*

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## TODD V. DUN, WIMAN &amp; CO. AND CHAPMAN.

*Libel—Privileged communication—Mercantile agencies—Pleading—Variance.*

In an action against a mercantile agency company the alleged libel consisted of the publication among the general body of the defendants' subscribers of a notice or circular containing the words, after the plaintiff's name: "If interested inquire at the office." The defendants pleaded that the notice also contained words explanatory of the alleged libel, which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection, that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

*Held*, that there was a variance between the libel alleged and that proved, and that as the proposed amendment would have raised a new issue to which the evidence did not apply the plaintiff should have been nonsuited.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it, they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel consisting of the information given by him to the company in answer to their request.

*Held*, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged, and there being no proof of express malice the plaintiff was not entitled to recover.

It is the occasion of publishing the alleged libel which constitutes the privilege. Where privilege exists, implied malice is negatived, and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof, that the defendant knew that what he was stating was untrue, is not evidence of express malice.

Judgment of the Court below reversed: *Clark v. Molynaux*, 3 Q. B. D. 235; *McIntee v. McCulloch*, 2 E. & A. 390, referred to and followed.

*Semble*, per OSLER, J.A., a mercantile agency company have no higher privilege for their business publications than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, 12 O. R. 791, where and in the present judgments the facts are clearly stated; and came on to be heard before this Court on the 8th, 9th, and 10th of November, 1887.\*

\* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

*Osler, Q.C., Lash, Q.C., and A. McDougall*, for the appellants.

*Ritchie, Q.C., and McGillivray*, for the respondent.

January 10, 1888. BURTON, J. A.—Although the argument at the bar took a very wide range, I desire to confine myself strictly to what I conceive to be the points for decision before us.

The plaintiff failed to sustain his original statement of claim, and an application was made at the trial to amend.

The plaintiff then charged the defendants, being a mercantile agency, with publishing a libel in these words, after the plaintiff's name, in a sheet published and circulated by them among their subscribers and others: "If interested inquire at office," alleging that these words had a well known meaning in the mercantile community and such subscribers, and was intended to convey, and did in fact convey, to the persons receiving the same, notice that the defendants possessed information regarding the plaintiff which injuriously affected his business standing, credit and reputation.

The defendants, in addition to the general denial of these allegations and other defences, pleaded that the sheet or notification in question contained, in addition to the words "If interested inquire at office," words explanatory thereof, which should be read in connection therewith, and which had not been set out in the statement of claim.

The plaintiff joined issue upon this averment.

At the trial, the document put in evidence sustained the averment so put in issue; the notification sheet was shewn to contain not only the words set out in the claim, but also the following:

"The words 'if interested inquire at office' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office because, in justice to them, the parties reported on, and to ourselves, the information can only be

properly conveyed to those entitled to receive it by the full report as we have it on our records."

The defendants' counsel moved for a nonsuit on the ground of a variance which was refused, the learned Judge remarking that it might be an assertion which was totally untrue, and the persons to whom it came might take a different meaning, and that it was competent for the plaintiff to shew notwithstanding what it was understood to mean by its recipients.

Both the passages are in their primary and natural sense perfectly harmless in themselves. But there is a great difference between the statement with and without the explanatory words. From those words standing alone it would be impossible to collect the meaning alleged in the innuendo on any known principle of construction. By construction, merely, the only reasonable and proper conclusion to arrive at is that the defendants meant exactly what they said. It could only be by the aid of extrinsic facts, as for instance that the defendants were not acting in good faith, but whilst to protect themselves from liability they adopted these words openly, they had advised their subscribers that they might disregard them, and assume that there was something wrong with the position and credit of the party there referred to, or something to a similar effect that a libellous inference could be drawn.

I am not at all disputing that both might be shewn to be defamatory by the aid of extrinsic facts, but the evidence necessary to make out the defamatory character of the libel set out in the statement of claim would be materially different from that required to prove the other.

It was said, during the argument, that as the whole matter had gone to the jury, they must be held to have found the words defamatory, even with the addition of the explanatory words. This is both inaccurate and misleading—inaccurate because, in point of fact, the evidence was pointed only to the words which were set out in the statement of claim, and misleading for reasons I am about to state.

Before the Common Law Procedure Act, if there were circumstances connected with the alleged libel which might cause the words to bear a more extended meaning than they would naturally bear, it was necessary to state them upon the record, in order to enable the Court to judge whether the words read in reference to those circumstances bore the defamatory meaning alleged. By that Act the rule of pleading was changed so as to render it unnecessary to make these allegations, but it was not intended thereby to alter the law, or make any change in the evidence.

It is true that since that Act it is only in very exceptional cases that the question of whether a writing is defamatory can be raised by demurrer or in arrest of judgment; but the Court have the right to say, when all the evidence is in, whether those facts which it would at one time have been necessary to set out on the record, have been established in evidence so as to give a defamatory meaning to words in themselves perfectly innocent.

In *Mulligan v. Cole*, L. R. 10 Q. B. 349, where the words themselves were not necessarily defamatory, and there was nothing in the evidence to shew that the publication was not perfectly bonâ fide, the Court held that the words were not capable of a defamatory meaning, and that it was not a proper case to leave to a jury.

In the present case if the amendment had been made the statement taken alone would, as I have said, have not been a libel on the face of it.

No reasonable man could draw a libellous inference from the words themselves, nor was there any evidence of any extrinsic fact affecting the credit of the plaintiff which could be connected with the sheet so as to give it a meaning to those who read it which it might not otherwise bear.

I refer to *Goldstein v. Foss*, 6 B. & C. 154; *Hearne v. Stowell*, 12 A. & E. 719, and *Capel v. Jones*, 4 C. B. 259, as shewing what facts in connection with the alleged libel it would be necessary to shew so as to warrant the jury in arriving at a conclusion that it had a defamatory meaning.



Whether, even aside from the variance, a foundation was laid for the evidence of the witnesses who drew from the words the inference they did in support of the innuendo, it is not necessary to determine, but I may refer to the remarks of Lord Bramwell in the *Bank Case* at p. 793 (a). Take the case he says of an invitation to dinner and a refusal because A. was to be of the party. It might be inferred from that that the writer imputed that A. was not fit for society, but would it be actionable? and he adds: "Take the case I put. The plaintiffs' manager is asked to take a glass of beer and refuses, saying that he never drinks Henty's beer. A possible inference is that it is bad beer. Is it actionable?"

No amendment was made in this case, and if made at the time it was asked for, would have been improperly made. But throughout the whole case the plaintiff persistently urged that no amendment was necessary until after the jury had retired, and the evidence was all in. Such an amendment would not be to determine the real question or issue raised, but to secure a finding, without evidence, applicable to the new issue sought to be raised by the amendment. I am of opinion that the appeal should be allowed, and the action dismissed with costs, without prejudice to the plaintiff bringing a new action if so advised, upon payment of costs.

#### TODD V. CHAPMAN.

BURTON, J. A.—The libel in this case consists of a letter written by the defendant in reply to an inquiry from Messrs. Dun, Wiman & Co., a mercantile agency by whom he was employed as local agent for the purpose of procuring information as to the standing and character of persons in business. It is thus alleged in the statement of claim ;

"4. On or about the said 17th day of November, 1883, the defendant Chapman falsely and maliciously wrote and published of and concerning the plaintiff in relation to his said trade or business, the words following, that is to say :

(a) Capital and Counties Bank v. Henty, 7 App. Cas. 741.



‘ I have made inquiries, and find that the general opinion is that he (meaning the plaintiff) was not robbed at all, and what has been done he has done it himself—at all events if he was robbed it is of not more than \$200 or \$300—circumstances are against him, still I cannot say ’—meaning thereby that the plaintiff was guilty of fraudulent and dishonest conduct in his said trade and business, and that he was unworthy of credit, in consequence whereof the plaintiff has suffered great loss and damage in his said trade and business ; and the Ontario Bank, which had formerly given credit and made advances to the plaintiff, thereupon ceased and refused to give credit or make advances to the plaintiff, and refused to renew the notes of the plaintiff, and divers other persons who had theretofore given credit to plaintiff refused thereafter to give him credit, and divers persons who had theretofore dealt with plaintiff ceased to deal with him, and the plaintiff was compelled to make an assignment of all his property for the benefit of his creditors, and was put to great loss, trouble and expense.”

The date appears to be misstated.

The letter to which this was a reply was written on the 20th November, and is in these words :

“ Be good enough to advise us confidentially at your earliest convenience of the standing and responsibility for credit of the following names.” The ordinary printed form that far.

In writing: “ J. A. Todd, g. s., Goodwood. Claims to have been burglarised and to have lost \$1200 to \$1600. Is this so? Full particulars. Is there not something wrong ?”

The Toronto agent of Dun, Wiman & Co., explains that he made this inquiry of the defendant Chapman in consequence of an application for information by A. R. McMaster & Bros., and a representation by them of certain rumours in reference to the plaintiff.

It was claimed that under these circumstances the writing was privileged, but the learned Judge preferred to allow the case to go to the jury, reserving that question for the consideration of the Court, and the jury found a verdict for a small amount in favor of the plaintiff.

Upon a motion afterwards made to the Divisional Court to set aside this verdict on the ground that the communication was privileged, that Court held that the defendant was disentitled to the defence upon grounds which I shall presently refer to, but whilst we are of opinion that in the way this question was reserved by the learned Judge at the trial, leaving it to the Court to say upon the undisputed facts whether the communication was privileged or not, we are not prepared, without further argument, to go the length of holding that the mere fact that these agencies cannot be carried on except through information supplied by agents, would be any sufficient reason for extending the shield of privilege to them, nor is it necessary to decide that question in the present case.

The learned Judge for the purpose of the trial held that it was not privileged, but he left it to the Court to say whether upon the facts in evidence it was so.

It thus appears that it was in consequence of an application by one of their subscribers, Mr. McMaster, and as the result of such application, that the inquiry was made of Chapman which called forth the letter which is the subject of this suit.

The mere fact that the agent is paid for furnishing the information is, in itself, no reason for withholding the privilege, if it be shewn that the person originally setting the agency in motion has an interest in the inquiry.

But the Court below, though regarding the communication as coming within the class of cases to which the law of privilege applies, held, that the defendant was disentitled to it because he did not, at the trial, give evidence to shew his bona fides by proving that an inquiry had been made, and that the general opinion which he said was entertained upon the subject referred to in his communication really existed.

We have, therefore, to say, whether the Court below were right in their conclusion upon that point.

The meaning, in law, of a privileged communication, is a communication made on such an occasion as rebuts the

primâ facie inference of malice arising from the publication of matter prejudicial to the character or credit of the plaintiff, and throws on the latter the onus of proving malice in fact, *i. e.*: that the defendant was actuated by motives of personal spite or ill will, or some other indirect or improper motive independent of the occasion on which the communication was made.

The case relied on by Mr. Justice Galt for the position he assumed, *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, seems to me, when thoroughly considered, to support the view I have expressed as to the onus being shifted to the plaintiff.

The majority of the Court there held that the communication was absolutely privileged, and that no action was maintainable. Chief Justice Cockburn: that it was a qualified privilege. The case came before the Court upon demurrer. The plea, therefore, justified the libel as having been made on a privileged occasion. The replication, whilst admitting the occasion to be privileged, sought to avoid its effect by alleging that it was written of actual malice and without reasonable cause. The onus of proving the facts alleged in the replication was upon the plaintiff; assuming the privilege to be a qualified one, they would, when once established, have renewed the presumption which the privileged occasion had primâ facie displaced.

One of the modes frequently resorted to of renewing the presumption of malice when once it has been held that the occasion is privileged and malice therefore rebutted, is to shew that the libellous statement is false to the knowledge of the defendant. But the onus of shewing this is upon the plaintiff.

In *Fountain v. Boodle*, 3 Q. B. 5, Lord Denman says:

“A character bonâ fide given to a servant of any description is a privileged communication, and in giving it bona fides is to be presumed. Even though the statement should be untrue in fact, the master will be held justified by the occasion, unless it can be shewn to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it.”

It is quite true that the libel itself may contain expressions which may in themselves afford evidence of malice ; but that would be a question for the jury, and not for the Judge, whose functions are confined to the inquiry of whether the occasion was privileged. That is a matter of law. If, at the close of the plaintiff's case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the Judge to non-suit.

It is no doubt the duty of the Judge to consider whether there is anything in the libel itself from which a jury might reasonably and properly infer malice.

In *Wright v. Woodgate*, 2 C. M. & R. 573, Parke, B. deals with the question thus :

“In the present case it became, in my opinion, incumbent upon the plaintiff to shew malice in fact. This he might have made out either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant shewing that he was actuated by a motive of personal ill-will.”

In *Cooke v. Wildes*, 5 Ell. & B. 341, Lord Campbell, in delivering the judgment of the Court, referred to *Tuson v. Evans*, in 12 A. & E. 733, where it was apparently held that where there was a comment in the libel in excess of privilege the Judge was justified in directing the jury that it was a libel, and leaving to them only the question of damages. But he disapproved of that case, and held that wherever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine.

The rule is clearly laid down by the Court of Appeal in England, in *Clark v. Molyneux*, 3 Q. B. D. 237, that the moment the Judge rules the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason is thrown upon the plaintiff.

“When once,” says Lord Justice Cotton, at p. 249 : “The learned Judge had laid down that the occasion was privi-



leged, the only question for the jury to consider was, whether the defendant acted from a sense of duty or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive was on the plaintiff \* \*

The question is not whether the defendant has done that which other men as men of the world would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty."

And again, p. 251: "The burden of proof lay upon the plaintiff to shew that the defendant was actuated by malice; but the learned Judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did, he did *bonâ fide*, and in the honest belief that he was making statements which were true."

It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty.

So, again, in *Spill v. Maule*, 4 Ex. 232, the Court refer to the excess as being evidence of malice. "We are all agreed," says Cockburn, C. J., "that the general proposition contended for is right, and that it may be that the language used in a libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances to which it is applied as to form strong evidence of malice upon the issue of whether the communication is covered by the privilege, and that an inference of actual malice may be drawn from its use.

If, therefore, any question of fact arose with respect to the circumstances, it should be left to the jury." And, again: "The communication being privileged, the presumption is in favor of the absence of malice in the defendant; and in order to rebut this presumption the plaintiff must shew actual malice, and he may, no doubt, shew this by a reference to the terms of the libel as being utterly beyond and disproportionate to the facts."

In the present case there is nothing in the language itself in excess of what the defendant might fairly state, and what it was his duty to state if the rumours he referred to existed.



To submit, say the Judicial Committee of the Privy Council, in *Laughton v. The Bishop of Sodor and Man*, L. R. 4 P. C. 508, the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat that protection which the law throws over privileged communications.

If then the occasion was privileged, the only remaining question is, as to whether there was any sufficient extrinsic evidence of malice: the plaintiff swears that the defendant was not friendly to him, but, as the learned Chief Justice remarked in his charge to the jury, he does not shew a solitary circumstance which would indicate that the defendant had any ill will to him except the writing of a letter to a Mr. Munnemacher so far back as March, 1883, but that the plaintiff himself was not able to point out any hostile or unfriendly act other than that letter, and it is shewn on the other hand that the plaintiff himself had, when about nineteen years of age, applied to the defendant for a recommendation to enable him to make application for a situation.

I will not say that that was not evidence proper to submit to the jury of malice, but standing as it does, alone, ought we if we hold the occasion privileged, to send the case down for a new trial in order that the opinion of the jury should be taken on the question of malice simply, upon that evidence. It is evidence of the weakest kind to shew the state of the defendant's mind at the time of the publication, and quite insufficient in my opinion to displace the presumption of good faith which arises from the occasion.

I am of opinion, therefore, that the appeal should be allowed, and the action dismissed, with costs.

Since writing the above the Chief Justice has called my attention to a case in the old Court of Error and Appeal, *McIntee v. McCulloch*, 2 E. & A. 390, in which the late Chancellor Vankoughnet delivered the judgment of the Court sustaining this view of the law.

I refer also to *Tench v. The Great Western R. W. Co.*, 33 U. C. R. 8; *Laughton v. The Bishop of Sodor and Man*, 21 W. R. 204, and *Henwood v. Harrison*, L. R. 7 C. P. 628.

OSLER, J. A.—The defendants, although joined in one action, are sued for separate and unconnected libels, and the case of each depends upon considerations peculiar to itself.

The libel for which the defendant Chapman is sued, is contained in a letter written and sent by him to the defendants Dun, Wiman & Co., managers of a mercantile agency, a portion of which, if written in good faith, and without malice, falls within the rule as to privileged communications. It was sent in answer to a letter from Dun, Wiman & Co. to Chapman containing a request for information as to the plaintiff's standing and responsibility for credit. From the course taken at the trial we must assume that the defendants Dun, Wiman & Co. made this inquiry in consequence of an application which had been made to them by one McMaster, who was a creditor of the plaintiff, and directly interested in his financial standing and responsibility. An answer given by them to McMaster in response to such an inquiry would, I have no doubt, be a privileged communication, and so therefore would an answer to an inquiry made by them for the purpose of putting themselves in a position to reply to him.

If McMaster had made the inquiry directly of Chapman the answer would have been privileged, and I think it can make no difference that it happens to have been made through a third person. Such inquiries as these made by or on behalf of a person interested in the business standing of another are usual. In the conduct of affairs it often becomes necessary to make them, and it must therefore be lawful to answer them. Such communications fall within the rule stated by Blackburn, J., in *Davies v. Snead*, L. R. 5 Q. B. 608, "that where a person is so situated that it becomes right in the interests of society that he should tell to a

third person certain facts, then, if he bonâ fide and without malice does tell them it is a privileged communication." This definition was approved by the Court of Appeal in *Waller v. Loch*, 3 Q. B. Div. 619, and the following passage from a useful work by a recent writer contains some pertinent observations on the subject. Speaking of the expressions "privileged occasion," "privileged communication," he says :

"It is a misapprehension of the meaning of words to call it a privilege. What is really meant is in no sense a privilege, but is a right, namely, the right to carry on one's business, or to take advantage of one's situation and circumstances, and this last is only another way of saying that each man is entitled to manage his affairs for his own advantage. The carrying on of business often involves the necessity of slandering or libelling some third party. The slander or libel in such circumstances is, however, only an incident to the lawful business so carried on, and being not invented, or used for the purpose of libel or slander, is in precisely the same position as a blow or even a homicide committed in self-defence or under some proper justification." *Patterson on the Liberty of the Press*, &c.

In the Court below, the defendant Chapman's privilege was put on the ground that the information had been furnished by him to a mercantile agency carried on by the other defendants, an association which was said to be "almost necessary" to the mercantile community, and which could not be carried on except by means of information procured from agents. I am not, however, prepared to hold that this would justify the general communication of libellous statements to them in the course of, or for the purpose of, carrying on a general business of that kind. I prefer to rest the privilege on the special occasion already alluded to, which I think was a priori a privileged one. The information given was not volunteered, though that circumstance alone is not the test of the existence of the privilege, but was made in answer to a relevant inquiry.

I fail to see that there was any reasonable evidence for the jury, either in the language of the communication or

in the circumstances under which it was sent, to shew express malice, or the absence of good faith (which would be evidence of express malice), on the part of the defendant; and it is in reference to the way in which this part of the case has been dealt with by the Court below that I feel compelled respectfully to differ from them.

The occasion being privileged, to use that term, the onus of shewing express malice and absence of good faith rested on the plaintiff. For this proposition the case of *Clark v. Molyneux*, 3 Q. B. D. 235, is a clear authority, and the following observation of Brett, L. J., is one of many passages to the same effect throughout the whole case:

“I think the jury were misled into believing that the onus of proof that the defendant was not actuated by malice in the statements he had made lay upon the defendant rather than on the plaintiff. I apprehend the moment the Judge rules that the occasion was privileged, the burden of shewing that the defendant did not act in respect of the privilege, but for some other and indirect reason, is thrown upon the plaintiff.”

The point was decided in the same way by this Court in *McIntee v. McCulloch*, 2 E. & A. 390, (1864). Van-Koughnet, C., in delivering the judgment of the Court, says:

“If the Judge rules that the occasion justifies the use of the words, what is there to leave to the jury? It is said, the bona fides of their use; but that is established when the privilege is admitted; for the truth of the words is assumed to support the privilege, or, at least, the defendant is not called upon to prove it, and that being so, the bona fides is made out.”

In other words, the onus of shewing the absence of bona fides is on the plaintiff.

In our case the learned Chief Justice for the purposes of the trial held that the communication was not privileged. No evidence was given by the defendant. The Court below while taking the view that the communication was privileged, although not for the reason on which we hold it to be so, held that before the defendant could avail him-



self of the privilege he should be prepared to prove that his statements were true. But if it is the occasion which constitutes the privilege, that cannot be so, for the privilege would be illusory and worthless if, notwithstanding the proof of the occasion, the defendant was obliged to prove the truth, or his belief of the truth of the communication. When the privilege exists implied malice is negatived : *Spill v. Maule*, L. R. 4 Ex. 232 ; and the mere untruth of the statement, unless coupled with proof that the defendant knew that what he was publishing was untrue is not evidence of express malice : *Fountain v. Boodle*, 3 Q. B. 5.

I, therefore, think that the appeal of the defendant Chapman should be allowed.

Then as to the action against the other defendants Dun, Wiman & Co. The cause of action set forth in the original statement of claim, was abandoned, and the libel pleaded and relied upon in the amendment made at the trial consisted in the publication by the defendants to all their subscribers whether interested or not, of a notification sheet or circular, containing at the end a list of names, among which the plaintiff's name appeared, followed by the words, " If interested, inquire at office." This was the libel complained of ; the statement of claim averring that these words had a well-known meaning in the mercantile community and amongst subscribers to the agency, and were intended to convey, and did in fact convey, to persons receiving the circular, notice that the defendants possessed information regarding the plaintiff which injuriously affected his business standing, and his credit and reputation.

By their statement of defence the defendants denied that the words had the alleged meaning, and they also pleaded that the circular in question contained, in addition to the words, " If interested, inquire at office," words explanatory thereof, which had not been set out in the statement of claim. On this the plaintiff took issue.



At the trial the publication of the circular containing the words set forth in the statement of claim was proved, and the plaintiff's counsel was proceeding to examine the witness as to the meaning conveyed "to the ordinary mercantile community" by the words, "If interested, inquire at office," when counsel for the defendants objected that these words could not be severed from the rest of the circular, and witnesses examined as to what they understood by them alone, because they ought to be read in connection with, and were qualified by another paragraph in the same circular, in which they were referred to as follows:

"The words 'If interested, inquire at the office,' inserted opposite names on this sheet, do not imply that the information we have is unfavourable. On the contrary, it may not infrequently happen that our last report is of a favorable character; but subscribers are referred to our office because in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it, by the full report as we have it on our records."

The objection was overruled, and there was no application to amend. It was afterwards taken at other stages of the trial, and also to the Judge's charge. The trial was proceeded with, witnesses examined, and the case given to the jury strictly upon the libel and innuendo alleged in the amended statement of claim.

In the Court below the only question which seems to have been considered was, whether the notification sheet or circular was a privileged communication, and it was held that the paragraph referred to would not have the effect of making a general publication of the other matter to all the subscribers, privileged, if the words pleaded were in themselves calculated to damage the plaintiff, and if the jury found that they were capable of the meaning alleged I confess I see no reason to disagree with that view of the case. However useful and even indispensable to merchants and others the business carried on by the defendants may be, it is carried on by them for their own private gain and advantage, and I am aware of no principle on which they

can claim a privilege for their business publications different from or higher than that to which other members of the community are entitled. Telegraph companies transmitting news, newspapers publishing them, are usually doing what is of great value and interest to the public at large, but they must take care that in doing it they do not libel private persons : *Silver v. The Dominion Telegraph Co.*, 10 S.C. R. p. 238. That is a risk they deem it worth while to incur in their business, and they must guard against it or meet it, just as others have to do. These defendants occupy a similar position : *Fleming v. Newton*, 1 H. L. Cas. 363 ; *Shepherd v. Whitaker*, L. R. 10 C. P. 502 ; *Lemay v. Chamberlain*, 10 O. R. 638. Therefore, if this was the only question to be considered, I should not be able to see my way to reverse the judgment appealed from.

But the plaintiff has a far more serious difficulty to contend with. He has founded his case and rested it throughout upon a part only of what is contained in the circular, averring that this part had a particular meaning which it was intended to convey, and did convey, to the mercantile community. The defendants plead that the circular contained other words explanatory of this part, which ought to have been set forth in order to judge whether the latter was capable of the meaning ascribed to it by the innuendo, so that there is a distinct issue raised on that point.

It appears to me that the defendants are right in this contention. The omitted paragraph is one which, in my opinion, must be read together with, and as explanatory of the language complained of, since it alters and qualifies the meaning which, standing by themselves, the words, "if interested inquire at office," might be deemed capable of bearing. Indeed, it goes further and says that these words do not imply that the information the defendants have to give is of an unfavorable character. There is, therefore, a fatal variance between the words laid, and those proved. Taking the whole together, they would not support the meaning alleged without some further averment.

I am far from holding that the whole publication is not capable of an actionable meaning as being in itself injurious to credit, but that is not the way in which it has been pleaded or treated at the trial. The examination and cross-examination of the witnesses was confined to the meaning ascribed to a particular portion of the publication, regardless of the effect which the omitted portion might have upon their minds, and that was the question submitted to the jury, and passed upon by them. It is therefore impossible at this stage of the case to permit an amendment, leaving the verdict to stand, as such an amendment would involve the presentation and trial of a case different in several material respects from that which has been dealt with by the jury. The only relief the plaintiff can have is a new trial, with leave to amend on payment of costs, or we should direct a non-suit to be entered, with liberty to the plaintiff if he desires it to bring a new action.

HAGARTY, C.J.O., and PATTERSON, J.A., concurred.

*Appeal allowed, with costs.*

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## MEAD V. O'KEEFE.

*Partnership—Dissolution by consent—Expulsion of partner—Good-will.*

J. H. M. entered into partnership with the defendants in the business of malsters and brewers, contributing the sum of \$14,071.80, as his share of the capital stock, and he and the defendant H. each paid to the defendant O'K. \$12,500 for his good-will in the business. One of the stipulations in the partnership articles was [No. 3] to the effect that any of the partners improperly dealing with the moneys or assets of the partnership should be liable to expulsion from the firm by a simple notice from the others or other of them to the effect that the partnership was at an end, in which case, by article 29, the partner so expelled should not have any claim for good-will in the partnership.

It was shewn that J. H. M., during the period that the partnership had been in existence (about seventeen months), had been in the habit of lending the funds of the firm to his friends, and otherwise improperly dealing therewith. No notice was, however, given expelling him from the firm by his partners. Instead of doing so, they verbally notified him that their partnership must cease, and then served him with a notice, which was duly published, that the partnership was dissolved by mutual consent.

J. H. M. at the same time executed a transfer of all his interest in the partnership business to his mother, the plaintiff, and she sued for the price paid by him to O'K. for the good-will.

The Common Pleas Division [CAMERON, C. J., dissenting] held the plaintiff entitled to recover the sum so paid; and an appeal from such finding was, owing to an equal division of the Judges of this Court, dismissed with costs.

HAGARTY, C. J. O., and OSLER, J. A., whilst agreeing with the other members of the Court that the dissolution had not been effected by a notice of the expulsion of J. H. M. under the 3rd clause, held that the most the plaintiff was entitled to was a reference to inquire what was the value of the good-will of J. H. M. in the partnership.

THIS action was originally instituted by Elizabeth Mead against Eugene O'Keefe and Widner Hawke; the statement of claim in which set forth that Joseph H. Mead and the defendants had carried on the business of brewers and malsters in partnership, under the firm name of O'Keefe & Co., and that such firm was dissolved on the 12th of September, 1883, on which date Mead ceased to be a partner, and the business was thereafter carried on by the defendants under the same name.

That at the time of the dissolution Mead assigned to his mother, the plaintiff, all the right, &c., of the said Joseph H. Mead, of and in the real and personal estate of the said firm of O'Keefe & Co., and of, in and to the stock in trade and plant, together with the rights and

credits of the said firm and every part thereof; and on the 17th of September, 1884, the plaintiff, Elizabeth Mead, commenced an action in the Chancery Division against the defendant, thereby claiming an account of the said partnership business, and that the affairs and business thereof might be wound up and settled under the direction of the Court, and according to the articles of partnership; and, amongst other things, claimed that the defendants might be charged with the share of the said Joseph H. Mead in the good-will of the business.

That such action came on for hearing on the 26th of May, 1885, before Boyd, C., who then held that no right to the good-will of the business, so far as Mead was concerned, had been transferred to his mother; and directed that in taking the partnership accounts, the Master should not allow the plaintiff anything in respect of the good-will, but directed that except as therein stated, the action of the plaintiff should be dismissed without prejudice to any proceedings or litigation which might be taken or had in respect of the good-will of the said business or the value thereof.

That on the 1st of June, 1885, Mead executed in favor of the plaintiff an indenture confirming the assignment of his good-will and interest of the said business, &c., of O'Keefe & Co.; and on the 4th day of September, 1885, the defendant commenced an action against the defendants in the Common Pleas Division, claiming, among other things, to have an account taken of what she was entitled to be paid by the defendants for the share of Joseph H. Mead in the good-will of the said business, and that the defendants might be ordered to pay the same to her.

That subsequently Elizabeth Mead departed this life and by her last will and testament, devised and bequeathed all her estate, real and personal, of whatsoever nature and kind to Georgianne Curran, in whose name the action was duly revived.

The statement further alleged that it had been agreed at the time of the formation of the partnership, that O'Keefe



should sell and assign to Hawke and Mead the whole of the good-will of the then existing business, and also of the new business and firm, for a large sum, to be paid to O'Keefe over and above the respective shares of capital controlled by them respectively.

Such agreement was carried out by the articles of partnership, and thereupon the said Joseph Hooper Mead paid up his share of the capital stock of the company, and also the sum of \$12,500 as agreed upon for the half of the good-will thereof.

That at the time of the dissolution of the said firm, the said Joseph Hooper Mead was the owner of one-half of the good-will thereof, and the good-will was then a valuable asset of the said business, and the said Joseph Hooper Mead besides his share of the other assets, was also entitled to the half of the good-will thereof; and that neither he nor the plaintiff had obtained any settlement or satisfaction for the said share of the good-will of the said business, and the defendants refused to come to any settlement in respect thereof.

Wherefore the plaintiff claimed (1) that an account might be taken of what the plaintiff was entitled to be paid by the defendants for the share of the said Joseph Hooper Mead in the good-will of the said business, and that the defendants might be ordered to pay the same to the plaintiff; (2) that the defendants might be restrained from using the partnership assets and property, and that the said assets and property might be sold and disposed of as a going concern under the direction of the Court; (3) payment of costs and further and other relief.

The defendants, amongst other matters of defence, alleged that the said articles contained several conditions and stipulations with regard to the dissolution and determination of the partnership; and that among the provisions contained in the said articles of co-partnership, were the following, that is to say:

“Secondly—That if \* \* any of the said partners shall be desirous to determine and dissolve the said partnership at any time before the

expiration of \* \* three years, and of such his desire, shall give not less than three calendar months' previous notice in writing to the other or others of them, or shall leave such notice at the place where the said business shall for the time being be carried on, then and in such case the said partnership shall cease and determine at the expiration of the said period of three months.

"Thirdly—That if any of the said partners shall be guilty of any breach or non-observance of any of the stipulations contained in the fourteenth, fifteenth, sixteenth, and seventeenth articles hereinafter mentioned, the other or others of the said partners shall be at liberty, if he or they should think fit, within three calendar months after the same shall have become known to him or them, to dissolve the said partnership by giving to the partners who shall so offend, or leaving in the counting-house of the place where the business shall then be carried on, notice in writing declaring the said partnership to be dissolved and determined, and the said partnership shall from the time of giving or leaving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly, without prejudice nevertheless to the remedies of the respective partners for the breach or non-observance of all or any of the covenants or agreements contained in these presents, at any time or times before the determination of the said partnership; and the partner to whom the said notice shall be given shall be considered as quitting the business for the benefit of the other partners who shall give the said notice. \* \*

"Fourteenth—That if any of them, the said Eugene O'Keefe, Widmer Hawke, and Joseph Hooper Mead, shall at any time during the continuance of the said partnership, lend any of the moneys, or deliver upon credit any of the goods belonging to the said partnership to any person or persons whom the other or others of them shall have previously by notice in writing forbidden him to trust, or shall borrow or take up any money whatsoever on account of said partnership, or compound any debt or debts which shall be due to the said partnership without the consent in writing of the others, then and in such case the partner so lending or delivering upon credit, \* \* shall make good unto the said partnership the whole of the money so borrowed, and the partner so compounding debts shall make good unto the said partnership the whole of such moneys and debts as he or any other person by his order or authority shall give any receipt for. \* \*

"Seventeenth—That books of account shall be kept by the said partners, and proper entries made therein of all the moneys, goods, effects, debts, sales, purchases, receipts, payments and all other transactions of the said partnership; and that the said books of account, together with all bonds, notes, bills, assurances, letters and other writings belonging to the said partnership, shall be kept at the brewery known as O'Keefe & Company's Brewery aforesaid, or in such other place where the business of the partnership shall be carried on, and each of the said partners shall have free access at all reasonable times to examine and copy out the same. \* \*

“Twenty-seventh—In the event of the said firm hereby formed being dissolved before the expiry of the said period of three years by the death of either of the said partners, or by the retirement of any partner from the said firm under article No. 2, or by any partner being compelled to leave the firm under article No. 3, then if the said partner so dying, retiring, or being compelled to leave the said firm be the said Eugene O’Keefe, the said Widmer Hawke and Joseph Hooper Mead, may, if they so desire it, carry on the said business, and if they elect so to do, be entitled equally to the profits, and liable equally for the losses of the said firm; but if the partner so dying, retiring from or being compelled to leave the firm, be either the said Widmer Hawke or the said Joseph Hooper Mead, then it is hereby agreed that the said partnership shall be continued until the expiry of the said term of three years. If it shall be the said Widmer Hawke that has so died or retired from or been compelled to leave the firm, then the said Joseph Hooper Mead shall have the option of buying the interest of the said Widmer Hawke in the capital stock and assets of the said firm, and on his so doing, and the said partnership being continued until the expiry of the period for which the partnership is formed, he shall be entitled until the expiry of the said term to one-half of the profits, and shall be liable for one-half of the losses of the said firm; and if it shall be the said Joseph Hooper Mead that has so died, retired from or being [been] compelled to leave the firm, then the said Widmer Hawke shall have the option of buying the interest of the said Joseph Hooper Mead in the capital stock and assets of the said firm, and on his so doing, and the said partnership being continued until the expiry of the period for which this partnership is formed, he shall be entitled until the expiry of the said term to one-half of the profits and shall be liable for one-half of the losses of the said firm. \* \*

“Twenty-nine—In the event of either of them, the said Widmer Hawke or Joseph Hooper Mead, retiring from the said firm hereby formed under article No. 2, or being compelled to leave the said firm under article No. 3, the parties so retiring from or being compelled to leave the said firm, shall not be entitled to receive and shall not receive from the other of them, or from any new firm which may be formed to carry on the said business, any sum of money whatever for or in respect of his goodwill in the said business.”

The defendants further alleged that on or about the 12th of September, 1883, the said Joseph Hooper Mead became desirous to determine and dissolve the said partnership, and the defendants waived and dispensed with three months’ or any notice in writing to them, and agreed that the said partnership should cease and determine in the same manner as if such notice were given by the said Joseph Hooper Mead, and thereupon the said partnership did cease and determine.

The defendants further alleged that on or about the said

12th of September, 1883, the defendants discovered, as the fact was, that the said Joseph Hooper Mead had, for a long time previous thereto, been, fraudulently and without the knowledge or consent of the defendants, using the moneys of the said firm for his own private purposes, and had been lending the same to his friends and relatives, suppressing all such transactions and not making any proper record or proper entries of the same in the books of the said partnership, and that he was otherwise grossly violating the terms of the articles of partnership, and the defendants thereupon proceeded to notify the said Joseph Hooper Mead that he must forthwith leave the said firm, and they were about to take proceedings to expel him under the provisions of the said articles; and the said Joseph Hooper Mead and the plaintiff, who was then present and took part in the arrangements entered into, accepted the said notification as sufficient to dissolve and determine the said partnership from the said date, and waived the necessity on the part of the defendants to follow strictly the provisions of the said articles in regard to expulsion, and the said partnership was in fact dissolved and determined by the expulsion therefrom of the said Joseph Hooper Mead, and by his misconduct the said Joseph Hooper Mead disentitled himself to any claim in respect of good-will; and that upon the said dissolution the said Joseph Hooper Mead agreed that the defendants should have any good-will in the said business which he could have or claim; and the defendants further alleged that having regard to the events which had happened, neither the said Joseph Hooper Mead nor the said plaintiff was entitled to receive any sum of money whatever for or in respect of the alleged good-will of the said Joseph Hooper Mead in the said business.

It further appeared that the plaintiff having joined issue with the defendants, the action came on for trial before Cameron, C. J., on the 11th of November, 1886, when he dismissed the same with costs, holding that Joseph Hooper Mead was in effect expelled from the said firm under sec-



tion three of the articles of partnership, and that under section 29 of the said articles, he was disentitled to anything for good-will, and therefore the plaintiff could not succeed in her action.

From that judgment the plaintiff appealed to the Common Pleas Division, which Court, [Cameron, C. J., dissenting.] on the 12th of March, 1887, ordered the proceedings in the action to be amended by adding thereto the name of Joseph H. Mead as a party plaintiff, and that upon such amendment being made, the judgment for the defendants should be set aside and a judgment should be entered for the plaintiffs for \$12,500 and costs of suit.

In the negotiations for the admission of Mead into the partnership, it was agreed that the capital stock thereof should be the sum of \$53,397.11, of which the sum of \$25,253.61 should belong to the defendant O'Keefe; the sum of \$14,071.80 to the defendant Hawke, and the sum of \$14,071.80 to Mead; that the defendants O'Keefe and Hawke should pay up their respective shares of capital by bringing in the business and assets of the old firm of O'Keefe & Co., and that Mead should pay his share of capital in cash; and which he did pay up in full.

From the judgment pronounced by the Common Pleas Division, the defendants appealed, and the appeal came on to be heard before this Court on the third and fourth days of April, 1888.\*

*Robinson, Q. C., and Moss, Q. C., for the appellants.* By the terms of the articles of partnership between Mead and the defendants, O'Keefe received from his co-partners the sum of \$25,000, in consideration of certain acts to be performed by him, which were fully set out in the 20th clause of the articles of co-partnership. As expressly stipulated for by the third and twenty-ninth clauses of the articles, any partner being compelled to leave the firm, was not to be entitled to any compensation in respect of good-will. The evidence clearly shews that Mead so misconducted

\**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, J. A.



himself as a partner as to justify his expulsion under the third clause, and the appellants have a right to insist that his expulsion was under that clause. In order to give effect to the provisions of that clause, it was not requisite that notice of expulsion should be in writing; it was sufficient if the parties understood the effect of the notice, and acted upon it as if in writing; and as if the partner leaving was compelled to retire under the provisions of that clause. O'Keefe swears that he distinctly told Mead that he could not be allowed to continue a member of the firm, and Mead accepted such verbal notice, acted upon it and waived a notice in writing or right to remain in the firm. The facts proved in evidence clearly shew that the dissolution was not by consent, and that the notice signed by the parties for publication in the newspapers, was expressed in the terms in which it is simply out of consideration for Mead, and in order to avoid public inquiry with regard to the causes of dissolution; and after that dissolution Mead ceased to have any interest in or right whatever to any claim for good-will in the business. The trial Judge, Cameron, C. J., found as a fact that the expulsion was under clause three, and his finding in that respect ought not to have been disturbed by the Divisional Court. Under any circumstances the appellants contended that the sum awarded to the plaintiff in the Court below, was greatly in excess of what the business was worth.

*J. MacLennan*, Q. C., and *Worrell*, for respondents, contended that the judgment of the Common Pleas Division was correct, and ought to be sustained. The good-will of the business previously carried on by O'Keefe and George M. Hawke, (the father of the defendant) was assigned by O'Keefe to Mead and the defendant Hawke; and also the good-will of the business to be carried on by the new partnership; and by the articles of partnership, the good-will is treated as a valuable property belonging to Mead and Hawke, to be paid and accounted for upon the death of either of those parties to their respective representatives, and it was only in case of a voluntary leaving the

partnership under clause two, or a forced retirement under clause three, that the value of the good-will was not to be allowed. The twenty-ninth clause may be looked upon as penal in its provisions, and must, therefore, be treated *strictissimi juris*, both as to the mode of exercise and the events which justify its being made use of. The dissolution in this case was avowedly by mutual consent, and not under clause three. Under that clause, expulsion could only be exercised by giving a written notice to the partner to be expelled in the manner and within the time therein provided, and the evidence shews that no such notice was given, and there was no waiver by Mead of such notice, nor any agreement made by him that the power of forfeiture might be exercised without it. Indeed, it may reasonably be inferred that O'Keefe, the principal partner and avowed friend of Mead and his mother, who was at the time a guest in his house, may have determined upon a milder course of action than that of stripping her of a great portion of the moneys left by her husband. Mead was young and unaccustomed to business, and may, no doubt, have felt that his applying to his own use, without the sanction of his partners, of the comparatively small sum used by him, was not a very grievous offence, as he then had an interest in the business to an extent exceeding \$27,000. However this may be, certain it is that the defendants, the other partners, did not profess or assume to act under the provisions of that clause until some time after the dissolution had actually taken place, and notice thereof had been given through the daily papers; and even admitting that the acts of misconduct complained of, were such as to entitle the defendants to exercise the power of forfeiture, it was optional with them to do so, and the evidence shewed that instead of exercising such power, they, to ensure a more speedy termination of the firm, agreed with Mead for a dissolution by mutual consent. Counsel also contended that as the agreement was reduced to writing, the defendants could not be heard to say that the dissolution was otherwise than by mutual consent; and

under the circumstances parol evidence would not be received to contradict, alter or vary the writing. On the dissolution, Mead would have been entitled to have the affairs of the partnership wound up in the ordinary way, by a sale of the assets, and in that case he and Hawke would have been entitled to the exclusion of O'Keefe to the value of the good-will, but by the terms of the dissolution, the business and property and good-will were all given up by Mead to his partners. In fact the effect of the dissolution was a sale by Mead to his partners of all his interest, including his interest in the good-will. Good will is an asset in a commercial business, and partners are ordinarily entitled to have the business sold as a going concern for the purpose of realising it. No misconduct of Mead's could render such a dissolution a ground for depriving him of any part of his share in the assets. Misconduct alone can work no forfeiture.

In addition to the cases referred to in the judgments, *Bluck v. Capstick*, 12 Ch. D. 863; *Wilson v. Johnstone*, L. R. 16 Eq. 606; *Pawsey v. Armstrong*, 18 Ch. D. 698; *Doupe v. Stewart*, 13 Gr. 637; *Mellersh v. Keen*, 27 Beav. 236; *Lee v. Page*, 7 Jur. N. S. 768; *Smith v. Crooks*, 3 Gr. 321, were cited.

April 9th, 1888. HAGARTY, C. J. O.—It is clear, I think, that Mead had so misconducted himself in violation of the articles that his co-partners were in a position to compel his retirement. This could have been effected by their simply serving him with a written notice “declaring the partnership to be dissolved and determined,” and from the giving thereof the partnership would absolutely cease and determine.

Immediately on discovering the misconduct they inform Mead that in consequence thereof they insist on his retiring. He objects at first, but ultimately yields, and the notice of dissolution is drawn up and signed by the three.

Now Mead could not be considered in any way placed in a worse position by the absence of this written notice.

It could have been drawn and served in ten minutes and, ipso facto, the partnership was dissolved.

I hardly see how beyond the avoidance on his part of the unpleasantness of a forced dissolution by notice it in any way was to his prejudice. I think it impossible on the evidence not to assume that he, fully aware of his liability to expulsion, agreed to a dissolution by apparent general consent.

Mead was also entitled to leave the firm by 3 months' notice under sec. 2. He must be taken to understand the terms of association and one of these (29) was that if he retired by notice on his own part under sec. 2, or was compelled to leave under sec. 3, in either case he could get nothing for good-will.

He was unquestionably compelled to leave under the provisions of sec. 3. But it is insisted that because the formality of a notice, instant in its effect and operation, was omitted, and he signed a consent to leave at once on pressure of the misconduct which placed him in his copartners' power, that the effect is different.

I feel the greatest possible hesitation in acceding to the view that the omission to give the notice—under the circumstances a most useless formality—enables him to claim what it is his special bargain that he should not claim in the event of misconduct under which he could be at once forced to retire.

I have been much struck by the vigorous reasoning of the late Sir M. Cameron on this part of the case, and I feel as he did, that substance ought if possible to prevail over form in such a case as this, where the omission of the form did not in the remotest degree affect or prejudice the party complaining.

I do not base my judgment wholly on this view.

I wish to consider it as a dissolution by consent; although it is not easy to view it except in the light of the proved cause of its occurrence.

The partners have submitted to a decree directing a full account of what may be coming to Mead as his share in the assets, but it excepts any claim for good-will.



The claim therefor is the sole subject of this suit.

I think it is to be taken that a clause in the articles, that if a partner die, the survivor shall have the option of taking the stock and other property belonging to the business, includes the good-will which is to be paid for.

This is declared by the Lord Chancellor agreeing with the Master of the Rolls, in *Hall v. Barrows* 4 De G. J. & Sm. 152, in which it is also declared that "the good-will of the business ought also to be valued, but that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as that of the partnership;" and with this declared, it was ordered to be referred. See the cases cited, Lindley, 5 ed. 447, and cases to the contrary. In *Reynolds v. Bullock*, 39 L. T. N. S., 443, Hall, V. C., follows *Hall v. Barrows*. He says:

"The good-will at the end of the term is a different thing from what it was before."

In *Austin v. Boys*, 2 DeG. & J., 629, under a clause that when a partner retired the other remaining should pay him for his interest and good-will in the business the fair marketable value, he not to practice within a named distance, the Lord Chancellor held that the term "good-will" associated with the words share and interest must be confined within the limits of the partnership, and that the plaintiff was not entitled to any supposed value of his share beyond it.

It also seems admitted to be a most important element in the valuation of a good-will, that the remaining or surviving partner cannot be prevented from continuing the business except by special contract. This is clearly stated by Lord Eldon, in *Cook v. Collinridge*, in 1825, and will be found reported at the end of the case of *Smith v. Everitt*, 27 Beav. 456, the Master of the Rolls having sent for the record of the case.

The case here is treated by the parties on the footing that Mead is entitled to his share of the assets and stock, etc., and therefore it is argued that his interest in the good-will



is to be valued unless controlled by something in the articles.

They are exceedingly voluminous. Possibly, if there had been more economy of words, there would have been less ambiguity.

The good-will of O'Keefe had been formally bought and paid for by Hawke and Mead on the formation at \$25,000, each paying half. He thus then ceased to have any further property in the good-will, and could not after the expiration of the term, continue or set up the brewing business in his own name or on his own account.

Then it is provided that if either of the three die during the term, the representative of the deceased shall be paid his share of interest in the stock, etc., and profits; but in no case should O'Keefe's representative get anything in respect of his good-will.

This would rather favor the idea that either of the others would be entitled thereto.

Clause 26.—If either Hawke or Mead die during the term, his representative should in addition be entitled to receive from the survivor of the two \$12,500, which shall be taken to be in full for the good-will in the business which the partner so dying had bought from O'Keefe; and the same should be transferred to and be the property of the partner making the payment.

The Chancellor makes this suggestive remark:

"The good-will of the former partnership and of the successors of that partnership, which is the firm now in question and its firm name of O'Keefe & Co., was purchased by Mead and Hawke in equal moieties, and from the time of that purchase it ceased to be a partnership asset and was not such an asset at the dissolution."

He afterwards asks: "Is then his share of the good-will of any appreciable value in the existing circumstances? A very considerable value is put upon it by the terms of the partnership articles, but the present case (if there is a voluntary dissolution) is not within any of the provisions and its value would have to be arrived at upon other data"

I must confess that I very fully share the doubts here expressed and do not clearly see their solution.

If any value is to be awarded to Mead for good-will I must express my dissent from the manner in which, in the Court below, the amount is arrived at.

The Court after quoting the clause as to the survivor in the case of the death of Hawke or Mead paying back the \$12,500 originally paid adds:

“This is cogent evidence that for the purpose of the business the good-will was to be taken as having a fixed and not a fluctuating value, and unless evidence could be adduced that it was really worth less by reason of the business having been injured, either by the conduct of Mead or otherwise, I do not see why the value placed upon it by O’Keefe when the deed was signed in April, 1882, should not govern at the time of the dissolution in September, 1883. In my opinion, therefore, the plaintiff’s motion must be made absolute to enter judgment for the plaintiff for \$12,500, and costs of suit.”

This judgment is against both O’Keefe and Hawke.

With much respect I am compelled to say that I cannot understand this.

The provision as to payment back of the \$12,500 as between Hawke and Mead was a very natural proceeding.

It was to begin on the death of one of them, an unlikely event as to one of two young men dying during a three years’ term and would be peculiarly hard on the family of either, and it was a risk which either would not fear to undertake, especially as a small premium of insurance by each on the life of the other for that short term could have been readily effected.

I think the provision forms no guide whatever in any other event than that expressed, viz., death.

The money was paid for O’Keefe’s good-will in consideration of his name and mercantile repute and of his contract to instruct the new partners in the business which it appears he did as contracted for. This money became his individual property, and as the learned Chancellor remarks, “from the time of the purchase it ceased to be a partnership asset and was not such an asset on the dissolution.”

I feel an insuperable difficulty in agreeing that, notwith-

standing this objection, the sum thus paid to O'Keefe is recoverable back by Mead.

We have no evidence whatever of the terms of dissolution beyond the contents of the notice signed by the three.

The co-partnership is dissolved by mutual consent. O'Keefe and Hawke will continue the business, may collect all debts and will meet all engagements.

In a large number of cases such a provision would be very ample consideration for a retiring partner to abandon all further interest in the firm.

It is conceded apparently that there is no special direction in the articles to meet this dissolution.

There is the implied agreement with Mead to assume the burden of all existing liabilities; we have nothing to guide us further.

The defendants raise no question as to Mead's rights except as to his claim for good-will.

It is clear from the notice signed by the three, that O'Keefe and Hawke are to continue the business, and it matters little whether Mead had or had not any right to set up as a brewer on his own account next door if he pleased to the old premises.

The highest point at which his alleged claim for good-will could be placed would be during the remainder of the term, or of an extended term of three years, if such extension could under the articles be formed.

I find considerable difficulty as to this extension under clause 20, as to its optional character.

It was argued that the effect of this dissolution was a transfer or sale to the defendants of all Mead's interest in the firm.

If this be so, it may well be doubted whether the law would infer any contract for the retiring partner being paid for good-will in a business which he agrees is to be carried on by the remaining partners, looking at good-will as an incident to a continuing business.

Nor would it be easy to imply an agreement on O'Keefe's part to pay back the sum paid to him personally by Mead.

In Tudor's Mercantile Leading Cases, 553 (1884), it is said :

"When the dissolution takes place by the retirement of a partner who does not contract to carry on the same business, the continuing partners will have the benefit of the good-will, and cannot in the absence of contract be compelled to pay for it where the articles of partnership, although they regulate the mode in which the partnership property is to be valued to the surviving or remaining partner, do not specify that any compensation is to be made for the good-will, the retiring partner will not be allowed anything for his share of it." *Hall v. Hall* 20 Beav. 139 is the only case cited for this.

In the edition of Lindley just published (5 ed., 1888), p. 444, it is thus stated :

"Again, when the partner retires not only from the firm, but from the business carried on by it, the continuing partner will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it, for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it unless some agreement to that effect has been entered into."

A like passage is also in the earlier editions. No case is there cited. But in this last edition, besides the "see infra" of the previous editions, a passage is cited from *Stewart v. Gladstone*, 10 Ch. D., 626, and "compare *Wade v. Jenkins*, 2 Giff. 509."

Again at page 447 it is said :

"When an agreement is entered into to the effect that a retiring partner shall be entitled to be paid for interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or of indefinite duration, for upon this will depend the amount to be paid to the retiring partner." Citing *Austin v. Boys*, 2 De G. and J., 626.

If the law as laid down in Lindley, be sound, I cannot see why it must not apply to this case.

Here Mead clearly "retires not only from the firm," but "from the business carried on by it," in the words cited.



He consents to others carrying that business on, so from that time he certainly retires from all further connection.

It is hard to see how, without some stipulation to that effect, anything coming under the head of "good-will" can be claimed by him out of it.

Everything in any way coming under such a general description, goes with the parties carrying on the old business in the old place.

There is a valuable note in Wood's edition of Collyer, Vol. 1, p. 238, a summary of cases, and a citation of what I have quoted from Lindley. It is pointed out how in some cases that good-will of a business can have little, if any, marketable value where a purchaser cannot be secured against rivalry on the part of the old partners.

The remarks of the Lords Justices in *Steuart v. Gladstone* may be referred to on the general question, and especially on the meaning of the valuation or appraisement (mentioned in clause 19) of all the particulars "capable of valuation or appraisement." Sir Geo. Jessel says:

"Practically it is difficult to understand what is meant by good-will, and it is so difficult that in other cases Judges have differed as to what it means, and what is comprised in it, and how it is to be sold, and I believe the result is that, without exception, it is never sold alone."

It is clear on the evidence that Mead had committed a breach of the articles, so as to entitle his co-partners to force his retirement under clause 3.

They omitted to serve him with a written notice, which would have at once determined his position. He would be held to be "considered as quitting the business for the benefit of the other partners;" and by sec. 29, if he retired under Article 2, allowing him so to do on a three months' notice, or if compelled to leave under clause 3, he is debarred from claiming from his co-partners, or from any new firm formed to carry on the business, any sum whatever in respect of his good-will in the business.

The draftsman probably inserted this provision on the



strong advice given in the text books as to provision being made as to claims for good-will.

But in the case before us we have the apparently voluntary retirement, with no special provision whatever beyond the dissolution, the carrying on the business by the two remaining partners, and their assumption of the payment of all liabilities.

I cannot see how a different rule can be applied to such a state of things, whether the concern be prosperous or the contrary, whether the retiring partner had or had not originally paid any premium for admission into the firm.

I may further refer to the definition of good-will in the last edition of Lindley, pp. 442-3, and its practical worthlessness when the remaining partners carry on the old business.

There is much ground for hesitation in arriving at any very certain opinion in a case like this.

But I come to the conclusion, that if the plaintiff be not excluded expressly from a share of the good-will by what has taken place, that whatever interest he could claim must be reduced to a very slight value, if any, by the fact that the others are allowed by him to carry on the business, and that his interest in what is called "good-will" cannot be valued with reference to what he may have brought into the business.

If the whole business could be sold as a going concern, we can understand a substantial interest in the connection, in the customers, and in the old stand. With O'Keefe and Hawke carrying on the business, I cannot see a substantial interest in Mead. Even granting that he could start in business in the old name, near to the old locality or elsewhere, I can see but little substantial value to him in the "good-will."

If the rest of the Court directed a reference with this declared qualification, I would not be disposed to object.

BURTON, J. A.—We are not, I think, concerned to inquire whether the alleged acts of misconduct by Mead were of a

character to entitle the other partners to exercise the power of expulsion under clause 3 of the articles of co-partnership. They appear to have consulted their solicitor as to their rights in that respect, but we have no evidence that they were advised that they could do so, or that they intimated to Mead that they intended to exercise the power. Such little evidence as there is is opposed to it, as the notice signed some days after the actual dissolution does not purport to be given in consequence of any breach or non-observance of any of the stipulations contained in the 14th, 15th, 16th, or 17th clauses of the articles of co-partnership.

The question, therefore, has to be treated as one arising under a dissolution of the partnership by mutual consent.

Now it is not disputed that in such a case every partner has a right, in the absence of any agreement to the contrary, to have the good-will of the business sold for the common benefit of all the partners. That was his right, as it was the right of each of the others to have all the assets as well as the good-will sold.

Instead of doing this, the other parties formed a new partnership, and agreed to purchase from Mead his interest in the business as a going concern and in the partnership assets. Why should this not include the good-will? It would have been so if the business had been put up and sold to strangers. What good reason exists for treating these parties other than strangers for this purpose?

By the purchase they acquired the right, I take it, to represent themselves as alone entitled to continue the business of the old firm, and alone to use the name of the old firm; at least the weight of authority appears to support that view, in addition to which O'Keefe was obtaining a release from him of his covenant not to carry on business after the expiration of the partnership on his own account for 25 years.

It is true Mead was not prevented carrying on a similar business, but not under the name of the former firm, nor as continuing or succeeding to the same business, and he

could be enjoined against specially or privately soliciting the customers of the former firm.

These may be very important advantages to the purchasers, and a serious detriment to the seller; and I see no reason whatever for assuming that when Mead sold out his interest in the assets and business of the old firm this was not included.

I think this is quite consistent with the passage to which we were referred in Lord Justice Lindley's work at p. 886 :

"That where a partner retires not only from the firm but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them."

The Lord Justice is, I think, referring to a case in which by the terms of partnership articles there is power of one partner to retire without that operating to dissolve the partnership, but not to a case of a dissolution being effected, and then some of the members of the firm purchasing out the interest of the other and the right to carry on the business at the former premises.

In *Stewart v. Gladstone*, 10 Ch. D. 623, the question there in dispute turned upon the construction of one of the articles of partnership. By the terms of that article the retiring partner was to have what was standing to his credit in the books, and the mode of taking the accounts prescribed by the articles, by which the sum standing at the credit of each partner at the annual balancing was to be determined, were only accounts for the purpose of ascertaining profits and regulating the drawings of the partners; and it was held, as one might have expected, that the good-will formed no ingredient in such a valuation so as to allow each partner to take year by year out of the partnership the amount of his share of the increase in the value of the good-will, and I quite share the feeling of the

then Master of the Rolls that no mercantile man ever dreamt of such a thing, and to that extent Lord Justice Fry's judgment was reversed; but the decision of the Court of Appeal by no means went the length of holding that the good-will in a business like the present was not a valuable property or of interfering with the right of a partner to claim that on a sale of the partnership business and assets the good-will should be included, and that he should be entitled to his share of the proceeds.

In this case the good-will belonged to two only of the firm, but I do not understand that that creates any difficulty. If the sale had been to a stranger, some means would have been resorted to to ascertain how much was paid for the assets and how much for the good-will, but the proceeds of the latter would have been divisible between Mead and Hawke. Here O'Keefe and Hawke become the purchasers of Mead's interest in that good-will.

I think the express provision in clause 29 of the articles, which provides that in certain contingencies therein referred to neither Mead nor Hawke shall be entitled to receive any sum whatever for his good-will in the business, strengthens the contention that in any other case they would be entitled.

The only point upon which I at any time entertained any doubt was as to the amount, but I find it not only impossible to say that the Divisional Court was wrong in fixing the amount at that figure, but I should find it very difficult to substitute another for it; all the evidence that the parties desired to give upon that point was gone into, and there is nothing in it to warrant the conclusion that the good-will is worth less now than it was when O'Keefe parted with it, and I think, therefore that we ought to affirm the judgment of that court and dismiss this appeal, with costs.

PATTERSON, J.A.—Two questions, neither of which can be said to be free from difficulty, have been argued on this appeal.



We have first to decide whether the dissolution of the partnership came about in the way stated in the only written memorandum there is on the subject, namely, the notice of the 12th of September, 1883, which was signed, for the purpose of publication, by the three partners, or was brought about in some other way—and then we have to consider the rights of J. H. Mead, the retiring partner, in respect of the value of what is called the good-will.

The notice is sufficiently plain and explicit in its statement: “that the partnership heretofore existing between the undersigned, as brewers and maltsters, under the style of O’Keefe & Co., has this day been dissolved by mutual consent. Messrs. E. O’Keefe and Widmer Hawke, who will continue the business, are authorised to collect all debts due to the late firm and will meet all the engagements thereof.”

The defendants take the position that the dissolution was not by mutual consent, but that Mead was compelled to leave the firm under the provisions of the third article in the partnership agreement, the notice being framed as it was in order to save his feelings or his reputation.

The onus of sustaining this contention is clearly upon the defendants, and after a full examination of the articles of partnership and the evidence, with the assistance of the able arguments addressed to us, I find no reason for holding that the dissolution was not what the notice states it to have been, a dissolution by mutual consent.

Article 2 provided for any one of the three partners dissolving the partnership by giving three months’ notice in writing to the others; Article 3 enabled any two of the partners to dissolve the partnership by a notice in writing to the third if he was guilty of any breach or non-observance of the stipulations contained in the 14th, 15th, 16th and 17th Articles. In that case Article 3 provided, differing therein from Article 2, that the partner to whom the notice was given should be considered as quitting the business for the benefit of the other partners; and, by Article 29, in the event of either Hawke or Mead retiring



under Article 2, or being compelled to leave the firm under Article 3, he was not to receive from the other, or from any new firm which might be formed to carry on the business, any sum of money whatever in respect of his goodwill in the business.

It is clear upon the evidence, and is not seriously disputed, that Mead did on a number of occasions fail in his duty to his partners by using the name of the firm, and pledging its credit in transactions foreign to the partnership business. One very glaring instance was drawing upon a special account for a considerable sum of money for private purposes of his own, and neglecting to inform his partners, even when he knew that the appearance of the unexplained charge in the bank book had occasioned disputes and some excitement. He had even obtained back the cheque from the bank and put it out of the way. His conduct about the matter was so bad as fully to justify the severe reprehension bestowed upon it by Mr. O'Keefe when the truth was at last discovered, and his determination that the offending partner should not remain in the firm.

It is not so easy, however, to say that the offence was against any of the four articles mentioned in Article 3.

Some of the irregular cheque transactions might be treated as lending partnership moneys, and that is forbidden by Article 14, but only after notice in writing. Article 17 requires the partners to make proper entries in the partnership books of all transactions of the partnership; but it is not perfectly clear that these transactions are of the kind there intended. Articles 15 and 16 do not touch the matter. No one would think of arguing that anything in these four articles applied to the acts charged against Mr. Mead were it not with the object of bringing those acts within the scope of Article 3, nor would any necessity for such an argument exist, because the case is expressly covered by the provision of Article 11, that no one of the partners shall, without the consent in writing of the others, employ any of the moneys or effects of the partnership, or engage the credit thereof, except upon the account and for the

benefit of the partnership, and it is probably also touched by the provisions of Article 9 against overdrawing the stipulated allowances.

I do not gather from the evidence of Mr. O'Keefe, who was the principal actor, that when he discovered the history of the special account cheque and insisted that Mead should not remain even a day longer his partner, he had his mind directed to the exact terms of the articles, though the articles were doubtless looked at; and it is worth noticing that when, a week after the notice of dissolution was published, something suggested the idea of giving a written notice to Mr. Mead, the notice given did not allege an offence against Articles 14, 15, 16, or 17, but apparently against Article 11 only. This is the notice:

TORONTO, Sept. 18th, 1883.

"J. H. MEAD, Esq., Toronto:

"*Dear Sir*—It having come to our notice that you have been misappropriating the moneys of our firm for your own private purposes, and also for the purposes of your friends, we hereby give you notice that our partnership with you is dissolved.

"Yours truly,

"E. O'KEEFE,

"WIDMER HAWKE."

I may read Mr. O'Keefe's account of how the dissolution was effected.

Q. Was the cheque he had drawn found? A. No; we never found them at all; he withdrew the cheques; I suppose this thing would never have been found out, but he gave his receipt to the bank for the cheques; he had no right to withdraw the cheques at all; I went down and saw that receipt; I made some remark to Mr. Bolster that Mr. Mead could not remain in that firm; I came down and saw Mr. Sampson here, and took advice with him; I saw the thin ice I was sliding on and felt pretty mean over my position; I was in a very dangerous position; a man to be guilty of a thing of that kind, I knew he should not have the power to sign my name, because I thought he would not stand at anything. I sent for Mr. Hawke and brought the whole matter before him, and decided on the course we would take; had Mr. Mead brought

into my house, and I confronted him and said: "Joe, we have discovered this mistake—discovered you have drawn that cheque and put that money in your pocket." He said: "I did, I got hard up and drew it." 'I said: How is this? how did you permit yourself to do a thing of this kind? of course all confidence between us is gone; a man guilty of anything of this kind cannot remain in partnership with me.' He tried all he could to get a day, and I determined Mr. Mead would not remain in that firm if I could help it. The upshot was, I wanted him to come down to Mr. Sampson's office. I said: 'There is no use, you cannot remain in this firm.' Ultimately we had to send for Mr. Sampson to get up the documents, and he came and prepared a paper. I read the paper over to Mr. Mead myself, and left the paper with him, and he signed it."

Most of this was repeated, but not varied in any matter of substance in cross-examination.

The money put in the business by J. H. Mead had been supplied by his mother, and on the same 12th of September on which the notice of dissolution was signed, and if I am not mistaken, at the same time, a document was executed by J. H. Mead which was intended to be an assignment to his mother of all his interest in the business.

Mr. O'Keefe was asked some questions on that subject, but I shall not stop to read that part of his evidence, because the matter is again spoken of in the evidence of Mr. Hawke, from which I shall make an extract.

The examination from which I have quoted took place in January, 1885. Mr. O'Keefe was again examined in December, 1885, and I think I ought to read part of what was then said which bears on the immediate question of fact:

"Q. Did that dissolution take place at Mr. Mead's request? A. No. Q. Which of the partners desired it? A. Hawke and myself. Q. Did you give any notice to Mead that you desired to have the partnership dissolved—notice in writing I mean? A. No. Q. Was anything said upon that occasion with regard to notice in writing? A. No. Q. You did not say anything else? A. No. Q. Did Mr. Hawke? A. No. Q. Did you hear him? A. No. Q. Did Mr. Mead? A. No. Q. Was there any discussion as

to the necessity of notice of expulsion in order to terminate the partnership in any way? A. No. Q. Or as to notice of terminating the partnership in any way? A. No. Q. Was Mrs. Mead present during the signing of these papers and drawing of them up? A. I could not say; she was in the house part of the time; as I said before, there was a good deal of excitement. Q. Was notice of dissolution submitted to her? A. I cannot say. Q. Was she present when it was signed? A. I could not say; I have a very indistinct recollection of what occurred. Q. Was anything said on that occasion in reference to the good-will money? A. No, not at all; that I am positive of. Q. He did not make any agreement about it? A. Not at all. Q. Nor you with him? A. Not at all. Q. Nor was any proposition made? A. Not at all. Q. There was no agreement on his part that you and Hawke were to retain it? A. There was nothing said at all. Q. Was anything said to Mrs. Mead on that day in regard to the good-will money? A. Not a word; that I am clear on.

I now turn to the evidence of Mr. Hawke :

“Q. When did you first know he had drawn it? A. The day the partnership was dissolved—in the bank. Mr. O’Keefe sent for me, I think, in the bank; I think I met him at the Bank of Commerce. Q. They told you they had found out Mr. Mead had drawn this cheque? A. Yes; at least that it was evident that he had drawn it, because he had signed this receipt for the cheques. Q. What did you say? A. I do not think I said anything much. Q. What was said? A. Mr. O’Keefe and I talked it over, and he said he did not see how we could continue the partnership any longer with a man like that; I thoroughly agreed with him that we could not, that it would not be safe to do so; a man that would do what he did might do a great deal worse—might put us both on the street. Then we went up to Mr. Sampson’s office; we looked into the articles of partnership and found he had committed a breach of the articles which would warrant us in dissolving the firm; then we went to Mr. O’Keefe’s house. Q. And sent for Mr. Mead? A. Yes; I think Mr. O’Keefe sent for him; he was coming along the street from the stable and he called him into the house. Q. What took place in the house? A. Mr. O’Keefe told him to his face that he had discovered who had drawn this cheque, that he, Mr. Mead, had drawn it. Mr. Mead said: ‘Yes, I did it.’ Mr. O’Keefe then said



that the firm should be dissolved; he could not consent to remain in partnership with him any longer. Q. What did Mr. Mead say to that? A. He did not say anything for some time; then he said he thought it was very hard to act so suddenly with him; I cannot say those were the words, but words to that effect; he wanted to know if there was not any way it could be settled, or overlooked. Q. Did you take any part in that conversation? A. Not a great deal; he then appealed to me, and asked me if I was of the same opinion as Mr. O'Keefe; I said I was. Q. Who was present then? A. Just the three of us. Q. Anybody else? A. No. Q. You sent for Mr. Sampson? A. Yes. Q. Was it long before Mr. Sampson came? A. No. I think not; we all remained there until he did come. Q. What did Mr. Sampson do when he did come? A. I think Mr. O'Keefe suggested to Mr. Mead he should transfer his interest to his mother; that was the best thing that could be done under the circumstances. Q. Was his mother present when Mr. O'Keefe made the suggestion? A. No, I think not. Q. It was just made in the presence of the three of you? A. Yes, and Mr. Sampson. Q. I suppose Mr. Sampson drew up the notice of dissolution? A. I think he did. Q. Was that signed soon after he came there? A. Yes, I think so."

And in his subsequent examination, Mr. Hawke corroborates Mr. O'Keefe thus:

"Q. At the time when the dissolution took place do you remember signing any other paper except this which I hold? A. Not that day. Q. Did you sign any other the day after? A. We signed that notice to Mead. Q. That is, you gave him a written notice? A. Yes; the day after, I think it was; a few days at any rate. Q. Was there any agreement made as to the good-will on that day? A. No. Q. Was there anything said with regard to giving him notice on that day? A. No. Q. No notice was given? A. No. Q. Nothing was said as to the good-will? A. No."

The evidence given by Mrs. Mead explains that by Mr. O'Keefe's advice she left her interests in his hands, understanding that, as she expresses it, she was to be put in Joe's shoes; and her testimony agrees with that of the defendants that nothing was said on the occasion of the preparation and signing of the documents of the 12th of



September, respecting the good-will, or respecting a written notice from the defendants to J. H. Mead.

Mr. Sampson was not himself examined ; but, inasmuch as he conducted the other examinations on the part of the defendants without attempting to elicit anything to the contrary, we may safely assume that his recollection agreed with that of Mr. O'Keefe, Mr. Hawke, and Mrs. Mead.

I find no support from any part of the evidence for the proposition that the real transaction was not just what the notice of the dissolution states it to have been.

It is very likely, and it is consistent with all the evidence, that the question which has now been raised respecting the good-will, was not in the mind of any of the parties concerned. It is mentioned by Mr. Hawke that the articles were looked at, and were considered to give power to the defendants to insist on a dissolution, but we are not told on what provision that opinion was founded, and there is reasonable ground for declining to assume that it was upon the third article. Had it been so we should naturally have looked for some action taken, or at least threatened, under the terms of that article, by giving the written notice, but nothing of the kind can be found until the notice of the 18th September, and it happens not to be such a notice as Article 3 would have warranted.

The suggestion that a different course was adopted, and that while all parties understood that the compulsory powers of Article 3 were being exercised, the document was made to state an untruth, out of friendly consideration for the delinquent partner or his mother, savors so much of good feeling and kindly forbearance that evidence in support of it would be somewhat eagerly laid hold of. I do not question the existence of the good feeling, but it has not found expression in the evidence, and there is nothing on which I can lay my hand as proof that it led to disguising the real character of the transaction. On the contrary, while we have evidence of earnest appeals by Mead to his partners for a short delay, and of their refusal, which cannot, under the circumstances, be called unjust, we find no

trace of request on the one hand or proposal on the other to soften the reality by putting forward an untrue version of the terms of the dissolution.

Nor can one avoid noticing that the object now asserted in argument could have been as well attained, without prejudice to the forfeiture of the good-will, by permitting Mead to withdraw, as of his own motion, under Article 2, the defendants waiving the three months' notice.

The decision to put the dissolution in the form of a mutual agreement may have been influenced by genuine friendly feeling, and a desire to give to the painful transaction the least disagreeable aspect. I must not be understood to intimate any idea that that was not so, notwithstanding that the evidence leaves it to inference; but whatever was the motive I do not think we can, upon any fair treatment of the evidence, hold the transaction to have been different in reality, or in the understanding of the plaintiffs, from that which the document expresses.

We have therefore a dissolution by mutual consent, one partner retiring and the other two continuing the business, and we have to say what, in that position, are the rights of the retiring partner in respect of the good-will.

The business had been carried on under the same name of O'Keefe & Co. by the defendant O'Keefe and Mr. G. M. Hawke. The latter retired and his son, who is one of the defendants, and J. H. Mead became partners of Mr. O'Keefe.

The capital of the new partnership was, as stated in the articles of partnership, \$53,397.11, which was made up of \$25,253.51, which on the dissolution of the previous partnership appeared to be the amount belonging to Mr. O'Keefe; \$14,071.80, which was that G. M. Hawke had in the business and which remained as his son's share of the capital, and a like amount of \$14,071.80 put in by J. H. Mead, or by his mother on his behalf. Thus Hawke and Mead contributed, in equal shares, a little over half the capital, and O'Keefe a little less than half. But, in addition to this, Hawke and Mead paid O'Keefe \$25,000, or \$12,500 each, for what is called the good-will.

This appropriation of the good-will to two of the three partners seems to make the case unlike any of the cases in the books, but I am not sure that the peculiarity is not more in appearance than reality.

The partnership was to last three years, and at the end of that time Mr. O'Keefe was to retire. There was an option in the two young men to require him to remain for a second three years on somewhat different terms, but we may leave that out of sight for the present.

The general terms of the partnership were, that O'Keefe should receive a salary of \$2,000 a year as head-malster and brewer, and should receive half the profits, the other half being divided between his two partners. He was to instruct his partners in the mystery of brewing, and that service seems to have been part of the consideration for the \$25,000, though having regard to the place at which his covenant to communicate the instruction is introduced and to one or two other things, particularly the payment of the salary to O'Keefe, and the stipulation that on the death of either Hawke or Mead the survivor was to pay to the representatives of the deceased the full sum of \$12,500, which it is stipulated "shall, amongst other things, be taken to be payment in full for the good-will in the business which the partner so dying has bought from the said Eugene O'Keefe," it may be that the \$25,000 should be regarded as the price of the good-will alone.

While the partnership with O'Keefe lasted, it is obvious that he was to share in whatever pecuniary gain resulted from the good-will of the business. When he retired at the end of the term he was to be paid only the amount of his capital and share of the profits, with nothing further for the good-will, and the younger men were to have the right, without interference or competition from him to carry on the business for all time under the name of O'Keefe & Co.

That seems sufficiently to explain what was bought under the designation of the goodwill of the business.

Mr. O'Keefe and Mr. Hawke both express themselves as satisfied that it was worth the money, though the former

includes with it the teaching of the business. This is one of his answers :

“Q.—Who was it fixed upon it? A.—I could not exactly tell you; I thought a business worked up in the shape that was in, with an immense amount of attention, to take in two young fellows and teach them all I knew, and put myself in a position to be ordered out at the expiration of three years, and deprive myself of the means of making money in this country—when I considered that, I thought it was a very small sum.”

The articles contain no provision, nor should we expect them to do so, for dissolution of the partnership by mutual consent; and it does not clearly appear, that in the events for which some provision is made, it was contemplated that no one but Hawke or Mead was ever to acquire an interest in the good-will.

On the death of either of them, the survivor was to own the entire good-will, paying \$12,500 to the representatives of the other (Art. 26); but while either of them who might voluntarily retire under Article 2, or be compelled to retire under Article 3, was (Article 29) to receive nothing for his share of the good-will, it does not appear that it was necessarily to accrue to the other of them. The words are : “Shall not receive from the other of them, *or from any new firm* which may be formed to carry on the said business, any sum of money whatever for or in respect of his good-will in the said business,” and in Article 3 itself it is declared that he quits the business for the benefit of the partners who give the notice.

The share of the good-will is everywhere recognised as a valuable interest in the business.

When therefore the partnership is dissolved by mutual consent, each partner has the same right to the value of this interest as to the value of any other asset.

If the concern was sold as in the ordinary course of realizing the partnership assets for the purpose of distribution, and sold as a going concern, the good-will would form part of the property paid for; and when in place of



selling to a stranger it is agreed that two of the partners shall form a new partnership and take the business as a going concern, it follows that they are to pay the retiring partner the value of the same interest which the stranger would have bought and paid for.

For these reasons I am of opinion that the judgment of the Divisional Court ought to be affirmed. The point which chiefly admits of doubt is, to my mind, the amount of \$12,500 which has been adjudged to be what the defendants should pay, but I find nothing on which to lay hold to fix with any certainty a smaller value than this, which I think may not unreasonably be taken to have been attached to the good-will by the parties themselves; and if I understand correctly the way in which the trial was conducted, the parties gave whatever evidence they desired to give upon this question of value, wherefore the case is not in my judgment one in which a reference to ascertain the value should be directed.

OSLER, J. A.—The case is very ably put from the defendants' point of view by the trial judge, the late Sir Matthew Cameron, but upon a full consideration of the evidence, I am not prepared to differ from the judgment of the Divisional Court that the partnership between the parties was dissolved, as they themselves express it, by mutual consent, and not under the 2nd or 3rd articles of the partnership deed. I am inclined to the opinion that the conduct of J. H. Mead, in drawing a cheque on the special account, and deliberately omitting to enter it in the partnership books, was such misconduct within article 17, as would have justified his partners in giving notice under the 3rd article to dissolve the partnership. Nevertheless, they did not proceed under that article, and, for anything we know to the contrary, they may have been advised that their right to do so was not clear. I think the real reason is, that it never occurred to them to do so. I do not find in the evidence anything to suggest that the course they took was so taken in substitution for that which



they might have followed under the 3rd article, or for the purpose of bringing about a dissolution on more or less advantageous terms to either party, than would have resulted if that article had been acted upon. That a dissolution was forced upon Mead, and justly forced upon him, there can be no doubt; but it was not forced upon him in a manner provided by the partnership articles.

The defendants' object seems to have been to obtain from him a written and immediate consent to a dissolution, so as make him as it were a party to it. They have thus brought about a dissolution by mutual consent, and in my opinion cannot insist upon the benefit of any penalty imposed upon the delinquent partner by the terms of the articles in the case of other modes of dissolution specially provided for, any more than they could do so if the partnership had been dissolved by decree in an action to dissolve it for the same misconduct. Moreover, there being no evidence of waiver of notice, or of intention to act under article 3, the defendants cannot say that, as the partnership was, in fact, dissolved for a cause which would have justified them in acting under it, they ought now to be in the same position as if they had done so, for by insisting on Mead's consent to an immediate dissolution, they as it were, tied his hands and prevented any question from being raised as to the misconduct complained of being within the scope of the 3rd and 17th articles, so as to entitle them without his assent to dissolve the partnership by notice.

There was, therefore, a dissolution of the partnership by mutual consent, not merely a dissolution in the sense of a partner retiring or withdrawing from the firm under some provisions of the articles of partnership, but an entire dissolution, Mead agreeing that O'Keefe and Hawke were to continue the business, and to collect all debts due to the old firm, and they agreeing with him to meet all its engagements.

The terms of the new partnership were not disclosed.

What then were Mead's rights on a dissolution of this kind? The sole question is, whether he had an interest in

the good-will for which his late partners taking over the business are liable to compensate him. The case is not one provided for or controlled by the partnership articles, and being an absolute dissolution, not a mere retirement or withdrawal of one partner for the benefit of the others in pursuance of some term in the articles, it does not appear to be such a case as is referred to in *Lindley on Partnership*, ed. 5, p. 444, where on the retirement of a partner from the firm, and the business carried on by it, the continuing partners are said to acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it, as they retain possession of the old place of business, and continue to carry on the business under the old name.

In the action in the Chancery Division, the plaintiff, as Mead's assignee, has obtained judgment for a reference to ascertain "the amount coming to her out of the assets of the partnership" and for payment to her by the defendants of such sum as the master shall find due. The right to take the proceedings now before us in respect of the good-will of the business was expressly reserved. It appears to have been assumed that the partners who continued the business, and formed a new partnership for that purpose, took over the assets, becoming liable to pay Mead his interest therein. Of the partners of the old firm Hawke and Mead alone were interested in the good-will, and the latter expressly relinquished his interest in it to Hawke and O'Keefe when he agreed that they should continue the business. Why is he not to be paid for his interest in that as well as for his interest in any other asset of the firm? If no agreement had been made respecting it, it must have been sold with the rest of the assets for the benefit of the two partners. *Lindley*, 5 ed., 443; *Pollock*, 4 ed., 104.

Upon the whole, admitting that the case is not free from difficulty, I think the good-will must be now dealt with just as the interest of Mead in the other assets of the firm has been dealt with in the former suit.

But I do not agree that on such a dissolution as has happened the sum paid by Mead and Hawke to O'Keefe on the formation of their partnership can be regarded as a criterion of the value of the good-will for which the plaintiff is entitled to be paid. It was paid partly for O'Keefe's good-will and partly as a premium for instructing the incoming partners in the trade and mystery of brewing throughout the six years for which that partnership might last. Moreover, the good-will of a business in which the practical man who has built it up and whose name it bears is to remain at the head of affairs for a number of years, is a very different thing from the good-will of one from which he is withdrawn, which may not even be carried on upon the old premises and which possesses merely the advantages of the use of his name and the absence of his competition. Its value is to be arrived at by ascertaining what, upon those conditions, it would have produced if it had been sold in the most advantageous manner and at such a time and under such circumstances that it would have produced the largest sum for all parties interested. *Mellersh v. Keen*, 28 Beav. 453; and see *Smith v. Everett*, 27 Beav. 446.

This may no doubt involve a troublesome inquiry. But it is a question to which the attention of the Court below was not directed, and the evidence was not such as to warrant them or this court in entering upon it. I think the appeal should to this extent be allowed and the case referred to the master to inquire and report what sum the plaintiff is entitled to in respect of J. H. Mead's interest in the good-will of the business.

*The Court being equally divided,  
Appeal dismissed with costs.*

## POWELL V. PECK, ET AL.

*Mortgage—Interest above legal rate—Interest after maturity of mortgage—  
Interest on money paid into Court.*

By the terms of a mortgage in which the principal was payable by instalments interest was reserved at the rate of eight per cent. per annum "until payment in full."

*Held*, [affirming the judgment of Proudfoot, J.,] that these words related to the period fixed for the payment of principal and that interest was only recoverable after that time as damages and not by the terms of the contract and that there was nothing in the circumstances of the case to justify the allowance of a greater rate than legal interest.

*Semle, Per OSLER, J. A.*—(1) *Primâ facie* the rate stipulated for in the contract up to the time certain may be adopted as a reasonable rate to be awarded as damages: (2) there is no distinction in principle in ascertaining interest to be awarded as redemption money, and interest to be awarded as damages.

During the progress of the action money had been paid into court by the defendants which remained there on deposit for upwards of seven years: *Held*, [also affirming the judgment below] that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and was not limited to the rate allowed by the court.

THIS was an appeal by the plaintiff and cross-appeal by the defendants from the judgment of PROUDFOOT, J., reported 12 O. R. 492, where, and in the present judgments the facts, giving rise to the proceedings, and authorities cited clearly appear; and came on for hearing before this Court on the 2nd of December, 1887.\*

*Delamere and English*, for the plaintiff appellant.

*Beck*, for the defendants respondents.

January 10, 1888. BURTON, J. A.—It is perfectly well established that where the covenant of the mortgagor is to pay the principal sum on a given day, and interest up to that given day at a stipulated rate, it is not a contract to pay interest at that rate after that day, and consequently in the event of default in payment there is no express or implied contract for the payment of subsequent interest at the rate previously mentioned.

I should have inclined to think that the words used in this mortgage were as strong as those contained in the

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, AND OSLER, JJ. A.



instrument in *King v. Greenhill*, 6 M. & G. 59, "so long as the security should continue" where the interest was held to run after the day fixed for payment, but I agree with the learned Judge below that they are not distinguishable from those contained in the mortgage in *St. John v. Rykert*, and that we are bound therefore by the decision of the Supreme Court in that case, 10 S. C. R. 278.

The Court can, however, give it in the shape of damages not necessarily at the same rate, although that would generally be the rule where the interest reserved did not exceed the legal rate of interest.

The learned Chancellor, in the case of *Muttlebury v. Stevens*, 13 O. R. 29, has referred to two cases in which a higher rate was given, but I think they are the only authorities to be found where a higher rate has been allowed.

In one the action was upon a bill of exchange where a higher rate was reserved, and the Court refused to interfere with the Master's computation, who had computed interest at the rate named in the bill, but the case of *Gibbs v. Fremont*, 9 Ex. 25, which was referred to on the argument, is no authority for allowing it, but the reverse.

That was the case of a foreign bill where it was held that on the dishonour of the bill which had been given by the drawee to discharge a debt due by him in California, he became as before the giving of the bill, liable to pay at the usual rate of interest in California as long as the debt remained unpaid, and in that case the Court say the rate is not to be left to the jury, for it depends on the rule of law. The amount of interest in each place is to be so left, and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact.

The jury there found the rate of interest at Washington and in California; but the Court held that it was a question purely of law for the direction of the Judge to the jury if they found damages, whether they should be at one rate or the other.

In another case, *Cameron v. Smith*, 2 B. & Ald. 305, Mr. Justice Bayley, speaking of the damages recoverable on a



bill of exchange, says, it is competent for the jury to allow either five per cent. or four per cent., according to their judgment of the value of money; or they may even allow nothing; and L. J. Cotton, in the Court of Appeal, says:

“Of course it would be hardly necessary to mention that the only damages as a rule given for the improper detention or refusal to pay money, are interest—loss of interest being the damages which the law supposes a man suffers for non-payment of money to him.” *Webster v. The British Empire, &c.*, 15 Ch. D. 176.

The other case referred to by the Chancellor, of *Morgan v. Jones*, 8 Ex. 620, as reported, is not very intelligible; the only expression of opinion in the judgment, was that it was governed by *Price v. Great Western R. W. Co.*, 16 M. & W. 244, where the sole question was, whether the plaintiff was entitled to recover in the shape of damages, a sum equivalent to the rate of interest mentioned in the mortgage, which was in that case the legal rate.

The action there was for money had and received, and assuming that there was any privity, the chattel on which the defendant had at one time held a mortgage, and part of the proceeds of which the plaintiffs sought to recover, had become the absolute property of the defendant, not only by default in payment, but by sale under execution of the plaintiff's interest, and the Court might well refuse the plaintiff relief under the circumstances; the defendant having paid over to the proper parties the excess over and above the principal and interest for which the lien was created.

In the ordinary case of the non-payment of a debt, no matter what amount of inconvenience the creditor may have been put to by the non-payment, the measure of damages is the interest on the money only.

It by no means follows that because a party is willing on a particular emergency to enter into a contract to pay a large rate of interest for a limited time, that it was in contemplation to extend that indefinitely in the event of his being unable to meet the contract at maturity, and when in fact the value of money may have fallen.

But without deciding that in no case could there be a recovery as damages beyond the legal rate of interest, there is nothing here to shew that any greater damages should have been allowed beyond the fact that a greater rate of interest was reserved by the mortgage.

*Mr. Coote*, in the last edition of his work, seems to entertain the opinion that damages in England would be confined to 5 per cent., and he refers to *Cook v. Fowler*, L. R. 7 H. L. 27, and to *Re Roberts*, 14 Ch. D. 49, where the Master of the Rolls remarks that although the fact of the parties having bargained for a higher or lower rate of interest for a time certain is always to be taken into consideration as shewing the value of money, it does not decide the question. And in *re Ex parte Furber*, 17 Ch. D. 191, Bacon, Chief Judge, referred to *Re Roberts*, and said there was nothing to be implied in that case from the fact that a day had been fixed for payment of interest at 10 per cent.

The Master computed the interest, as the learned Judge points out, at the rate specified by virtue of the terms of the contract, and not as damages, and the learned Judge holding that to be incorrect assessed the damages at six per cent., and there was no evidence before us to shew that he was incorrect. Many years have elapsed since the contract was made, and the rate of interest may have varied greatly in the interval.

I am of opinion, therefore, that the appeal fails, and should be dismissed.

I do not think our judgment conflicts with the decision in *Muttlebury v. Stevens*, 13 O.R. 29. The action in the present case embraces the old action on the covenant, and for the recovery of the land by foreclosure. In the case I refer to the mortgage was not due except by reason of the proviso that the principal money should become due whenever default was made in payment of interest. In giving during the six months allowed for redemption the rate of interest reserved by the mortgage, which was not payable for some years, but which was accelerated by the non-payment of an instalment of interest, the Court was

merely allowing the redemption on the same terms as to the rate of interest as the parties had agreed to pay during the same period.

The cross-appeal, I think, also fails. The money was paid into Court by the defendant to secure some purpose of his own; that end having been attained he became entitled to recover out of Court the sum so paid in, and interest—that sum, whatever it was, he paid over to the plaintiff, and reduced the mortgage to that extent. Until such payment the plaintiff was in no way interested in the amount which belonged exclusively to the defendant, and was deposited in Court for some object of his own. I think, for the reasons given by the learned Judge, the decision below on this point, should be affirmed, and the cross-appeal dismissed.

OSLER, J. A.—I think the covenant in the mortgage in this case cannot be read as including an agreement to pay interest on the principal after the time fixed for the final payment of the latter.

The words “until payment in full” relate to that period as may readily be shewn.

The principal is payable by equal instalments of \$1,000 each on the 1st June, in each of the years 1878, 1879, and 1880. The interest is payable half-yearly on the 1st days of December and June in each year, on the whole unpaid principal until payment in full with interest at the same rate on all overdue “payments” of interest. Unless the words “until payment in full” are limited to the date of the 1st June, 1880, it would be necessary to treat the contract to pay interest half-yearly on the gale days already mentioned, as continuing after default in payment of the last instalment of principal, with the further result that such subsequent interest, if not paid on the half-yearly gale days, would be deemed overdue so as to bear interest at the same rate in accordance with the clause relating to payments of interest upon interest. In short, the plaintiff is obliged to contend that the covenant extends not only

to pay interest at eight per cent. after maturity, but also to pay it half-yearly as before; a construction, I think, quite inadmissible, and is, indeed, almost absurd, where the principal is in default. The case, however, apart from this way of looking at it, is quite within the decision of the Supreme Court in *St. John v. Rykert*, 10 S. C. R. 278. The words "until payment in full," cannot have a more extensive meaning than was attributed in that case to the words "until paid."

If there is a shade of difference in the expression it is that it more strictly appropriate where, as here, the principal is payable by instalments. Therefore I think that the learned Judge was right in reversing the decision of the master on this point.

Interest was not recoverable by the terms of the contract after the day fixed for payment of the principal, but by way of damages, or as part of the redemption money only. Then the question is what rate of interest should be allowed, and whether it is to be ascertained on one principle in allowing it as damages on a personal order for payment of the mortgage debt; and on another in computing it as part of the redemption money to be paid in a redemption or foreclosure suit.

A simple solution of the question would be afforded if we could hold that the case came strictly within the clause of the Interest Act, R. S. C. ch. 127, sec. 2, which provides that, "whenever interest is payable by the agreement of the parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 6 per cent. per annum." As, however, interest is not payable here by the agreement of the parties or by the law *qua* interest, but *qua* damages only, the statute does not absolutely determine the rate of interest to be allowed, although it may well, in most instances be adopted as a guide.

I am therefore not prepared to affirm that the Master or the learned Judge might not have allowed in this case had they thought the circumstances warranted it, either as damages or as redemption money the rate mentioned in the mortgage, viz. eight per cent. if such rate was not in itself



or shewn by the evidence to be unreasonable or extraordinary, or such as the parties themselves would not be likely to have assented to had the loan been originally for a longer period or subsequently extended.

In *Leake* on Contracts, p. 1104, the rule is stated thus: "On mortgages, interest after the day cannot be claimed under the covenant, but is recoverable only as damages for the breach. It is, however, considered from the nature and object of the security to be intended by the party that the debt should continue to bear interest, and therefore it is the invariable practice to give interest by way of damages in such cases, *and at the same rate.*"

This statement of the law is fully borne out by the cases of *Price v. The Great Western R. W. Co.*, 16 M. & W. 244; *Morgan v. Jones*, 8 Ex. 620; *Keene v. Keene*, 3 C. B. N. S. 144. I think it clear that in each of these cases the Court meant to decide that interest might be given as damages at the rate mentioned in the instrument, if indeed they do not go so far as to say that the damages were governed by that rate. There is nothing in *Price v. The Great Western R. W. Co.*, to indicate that the damages were given at the rate of five per cent. for any other reason than that it was the rate mentioned in the mortgage debenture, otherwise they might have been assessed at the court or statutable rate of four per cent. In the other two cases they were allowed at ten per cent., and for a similar reason. So far, however, as those cases can be considered as laying down a general rule that the rate mentioned in the instrument absolutely governs the measure of damages, they are to that extent, but no further, qualified by the subsequent case of *Cook v. Fowler*, L. R. 7 H. L. 27, which is now the leading authority on this subject.

There the defendant's testator had given the plaintiff a warrant of attorney to enter judgment for £1,350, with interest at five per cent. per month, if not paid before a day named, and it was decided that the holder of the warrant was either in effect a judgment creditor for the



principal and interest at that rate on that day, and for the statutable interest of four per cent. thereafter, on the whole; or that his claim was one upon an instrument given to secure a debt of £1,350 and interest up to a certain day without any mention of subsequent interest upon the face of the instrument.

“If so,” says Lord Cairns, “according to the well known principle,” and he refers for that to the case of *Mounson v. Redshaw*, 1 Wm’s.Saund. 201, (n) “any claim in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted, to consider the position of the claimant and the sum which properly and under all the circumstances, should be awarded for damages. No doubt *primâ facie* the rate of interest stipulated for up to the time certain might be taken, and generally would be taken as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case and to decide what was the proper sum to be awarded as the measure of damages.” After examining the circumstances of that case he continues: “Therefore whether your lordships take as a judgment for a specific sum bearing no interest beyond the statutable rate of four per cent., or whether you take as a claim for damages for the detention of a debt, in either case it appears to me to be out of the question that the rate of sixty per cent could be allowed. It appears to me on the first view the rate of four per cent. is the rate absolutely assigned by statute; upon the second case it is for the tribunal to fix the rate of damages. It is possible that the rate of five per cent. might have been given by jury or by a Judge; but the primary Judge having in this case only given the usual rate assessed in the Court of Chancery—namely, four per cent., I certainly do not think proper to advise your lordships to disagree with that opinion at which he has arrived.”

Lord Hatherley cites with approval Mr. Justice Bayley’s opinion in *Cameron v. Smith*, 2 B. & Ald. 305:

“Although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages which must go to the jury in order that they may find the amount, and it is competent for them either to

allow five or four per cent. according to their judgment of the value of money, or they may even allow nothing in case they are of opinion that the delay of the payment has been occasioned by default of the holder" of the instrument.

Lord Selborne says :

"Although in cases of this class interest for the delay of payment post diem ought to be given, it is on the principle not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay, but that is because ordinarily a reasonable and usual rate of interest which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your lordships the agreed rate of interest is excessive and extraordinary ; \* \* no Court or Judge could under the particular circumstances \* \* have adopted that rate of interest as a proper measure of damages, without a very great miscarriage of justice."

It will be observed that there is not a word in the case to indicate that even a higher rate of interest than five per cent. might not have been given, by way of damages if the rate agreed to by the parties to the instrument, instead of being the oppressive and extraordinary one of sixty per cent. per annum, had been of a moderate character, and even considerably above the usual commercial value of money in England, viz., five per cent. But the extraordinary rate there reserved precluding the assumption that the parties contemplated its continuance post diem, there was nothing upon which any other rate than the statutory rate of four per cent., or the commercial rate of five per cent. could be adopted as the proper measure for damages.

In *Re the European Central R. W. Co.*, 4 Ch. D. 33, the holders of certain debentures of the company payable on the 11th October, 1865, with interest, meantime yearly, at the rate of six per cent., recovered judgment for principal and interest up to November 1865, and subsequently attempted to prove in the winding-up proceedings against

the company, not only the judgment debt and interest thereon at the rate of four per cent., but also for the additional interest at two per cent. on the amount of the debentures from the date of judgment. It was held that the original debt was merged in the judgment, but Bramwell, L. J., who delivered the judgment of the Court of Appeal, (consisting of himself, and James and Baggallay, L.JJ.,) says: "If no action had been brought, the appellants might have been entitled to prove for five per cent., or perhaps even six per cent. by way of damages."

Upon the best consideration I have been able to give to the subject, I am of opinion that in the case of *Cook v. Fowler*, we find a rule which the learned Chancellor in *Muttlebury v. Stevens*, 13 O. R. 29, describes as a good working rule, for determining the rate of interest which may be recovered as damages for delay of payment post diem in an action upon the covenant in the mortgage: and that which may be allowed by the Court as part of the redemption money in a foreclosure or redemption action. What that rate should be must depend in each case upon all the surrounding circumstances, but primâ facie the rate stipulated for in the mortgage, up to the time certain, *may* be adopted as the reasonable rate to be awarded in an ordinary case.

I have not found any rule enunciated in the text books, or any decisive authority that the court will impose upon a mortgagor as an equitable term, or as part of the price of redemption, the term of paying a higher rate of interest post diem than under all the circumstances would be awarded by the same Court or a jury as damages by way of interest in an action upon the covenant, nor can I see any logical reason for such a distinction.

In the judgment of Amphlett, J. A., in *Gordillo v. We-guelin*, 5 Ch. D. 287, there are some expressions which look in that direction, but they appear to be based on the cases of *Price v. Great Western R. W. Co.*, and *Morgan v. Jones*, which, as I have said, are qualified by the later case of *Cook v. Fowler*; and Brett, J. A., in the same case, at p. 301, speaks of "redemption in its equitable sense, \* \*

the debtors taking up these bonds must redeem them on the ordinary terms, that is to say they must pay the principal, not with interest as interest, but with the damages which a jury would give instead of interest. In a court of equity it is not called damages, but it is called interest, or more properly speaking, redemption money."

In that case the bonds were mortgage bonds bearing interest at seven per cent. payable half yearly, and were subject to a contract by which the debtors on taking certain proceedings became entitled to redeem them at an earlier date than that specified in the bonds. By the terms of the contract no interest was to be payable after the day thus fixed for redemption. But as the contractors failed to provide funds for payment of the bonds drawn for redemption, it was held that they could not be redeemed afterwards except upon payment of the principal with interest at the same rate up to the time of payment.

James, L. J., thought that interest was payable by the terms of the contract until funds had been de facto provided for payment of the principal, but the judgment of Brett, J. A., puts the right to interest upon the ground I have mentioned.

So again in the case of *Muttlebury v. Stevens*, already mentioned, the learned Chancellor held that the rate stipulated for in the mortgage, which was eight per cent. should be computed post diem up to the day of redemption or foreclosure, under circumstances, needless to be set forth here, which would have fully warranted a jury in giving that rate, and would have made it inequitable to permit of redemption on any other terms.

In *Popple v. Sylvester*, 22 Ch. D. 98, there was an express covenant to pay interest so long as anything could be recovered out of the security, which remained operative notwithstanding the recovery of a judgment upon the covenant to pay the principal debt. With this case however should be read the judgment of the Court of Appeal in *Ex parte Fewings*, 25 Ch. D. 338, in which it was held that the covenant was merged in the judgment, and that



the mortgagee was only entitled to interest at 4 per cent. upon the judgment debt.

Looking at the cases I have referred to I do not think that the case of *Re Roberts—Goodchap v. Roberts*, 14 Ch. D., can be vouched in support of the contention that no higher rate than 6 per cent. can be recovered in our Courts as damages or interest post diem.

There the Court was sitting as a jury, and the question was what rate of interest should be given as damages on a mortgage bond bearing interest at ten per cent. there being no covenant to pay interest after the day named for payment of the principal.

Jessel, M. R., says :

“The fact of the parties having bargained for a higher or lower rate of interest for a time certain is always to be taken into consideration as shewing the value of money, but it does not decide the question. It appears to me that no jury would give more than five per cent. in such a case as this, and sitting as a jury we ought not to give more.”

In the case before us we cannot interfere with the finding of the learned Judge, as to the rate of interest which should be given as damages or redemption money. He might as I have said, have adopted a higher rate, but it is impossible for us to say that he was wrong in taking the statutory rate of six per cent. as the proper measure of damages under all the circumstances. The appeal of the mortgagee must therefore be dismissed.

The appeal of the mortgagor against the allowance of four per cent. on the money he had paid into Court, over and above the Court interest, must also be dismissed. The mortgagor paid it into Court in order to obtain a stay of proceedings, while he was contesting the right of the mortgagee to recover it at all. The latter could not have taken it out of Court pendente lite, and upon reason and authority (*Sinclair v. Great Eastern R. W. Co.*, L. R. 3 C. P. 391.) the mortgagee is entitled to whatever rate of interest may



be properly recoverable beyond the ordinary Court rate on the money so paid into Court.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

*Appeal and cross-appeal dismissed with costs.*

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IN RE MACDOUGALL.

*Solicitor, certificate to practise as—Uncertificated solicitor allowing his name to be used—R. S. O. ch. 140.*

*Held*, affirming the judgment of the Q. B. D. [BURTON, J.A., dissenting,] that a duly admitted and enrolled solicitor, who does not take out his annual certificate, as such, cannot allow his name to be used in legal proceedings as partner by a firm of practising solicitors even though he does not derive any emolument therefrom, without rendering himself liable to the fines and penalties imposed by R. S. O. ch. 140, secs. 20, 21.

THIS was an appeal from the judgment of the Queen's Bench Division—reported 13 O. R. 204, where the facts are fully stated, and came on for hearing on the 20th March, 1888.\*

*Shepley*, for the appellant.. The statute under which this proceeding was taken, R. S. O. ch. 140, secs. 20-21, must be treated as a penal enactment. As such it must be construed strictly, and here the evidence is distinct that the appellant has never practised in any Court within the meaning of the Act; and it is clearly proved that he never was, at any time, an actual member of the firm of McDougall, McDougall & Belcourt. The rule of law which renders a man holding himself out, or allowing others to hold him out, to the world as a partner does not apply to this case, where it is simply a personal liability to the Law Society, under the provisions of the Act.

\* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A..

*Reeve*, Q.C., and *W. Read*, for the respondents. The evidence of Mr. F. Macdougall shews that the name of the appellant was indorsed on the outside of papers in the proceedings taken by the two avowed members of the firm, F. Macdougall & Belcourt: that it is submitted was a practising within the meaning of the statute. It may be conceded that the appellant did not practise in so far as the actual personal conduct of litigation by himself was concerned, but clearly he allowed others to practise in his name, and thereby he really did practise, that is, practised by means of those associated with him in business, although it may be admitted that he received no share of the profits. They also contended that so long as the appellant remained on the roll of solicitors he was liable to pay all duly imposed fees if directly or indirectly practising whether as nominal partner or otherwise. In addition to the cases referred to in the Court below *Re Simmons*, 15 Q. B. D. 348, was cited.

April 3rd, 1888. OSLER, J.A.—Mr. Shepley argued with a good deal of ingenuity, that as Mr. MacDougall is not really a member of the firm of MacDougall, MacDougall & Belcourt, as between themselves, but merely permits his name to be used in legal proceedings, and holds himself out, or allows himself to be held out to the public as one of the members of the firm, he is not a practising solicitor within the meaning of the Solicitor's Act. With all deference to those who hold a contrary opinion, I think that if we accede to this argument we should give the Act a needlessly narrow construction, and fritter away a provision made quite as much in the interest of the public as of the Law Society.

If the contention can be upheld, writs may be issued, and proceedings in the Courts carried on in the name of an uncertificated solicitor so long as the work is actually done and the whole profits derived by one who is certificated, but who for any reason does not wish to practise in his own name.

Mr. MacDougall is a duly qualified solicitor, that is to say, a solicitor admitted and enrolled, but he has not taken out his annual certificate.

He, nevertheless, holds himself out or permits himself to be held out to the public as a practising solicitor, that is to say, as a member of a firm of practising solicitors. This he may no doubt do without incurring any penalty.

He has also permitted his name to be used as a member of such firm in carrying on legal proceedings in actions in the Courts. He is admittedly not a member of the firm as between himself and the other solicitors who are permitted to use his name, and has no interest in the fees and costs of the litigation.

Four sections of the Act require to be noticed.

Section 20. If any solicitor (or any member of any firm of solicitors in his own name, or in the name of any member of his firm) practises in any of the Courts without such certificate being taken out by himself, and by each member of his firm, he shall forfeit, &c.

Section 21. If any solicitor practises in any of the Courts \* \* without such certificate \* \* he shall be liable to be suspended, &c.

Section 25 forbids a solicitor to *act* as professional *agent* of a person not duly qualified to act as a solicitor, or to *suffer his name to be used* "in any such *agency*" on account or for the profit of any *unqualified person*.

Section 27 declares that any one not being himself a plaintiff or defendant, who without being admitted and enrolled as a solicitor, commences or prosecutes or defends any action or proceeding in Court, shall be incapable of recovering fees, and shall be deemed guilty of a contempt of Court, &c.

The appellant has not offended against the last two sections. He has not acted as professional agent of an unqualified person, nor suffered his name to be used as such agent on account of or for the profit of such unqualified person. Nor has he prosecuted or defended any action without being admitted and enrolled as a solicitor.

The question, therefore, simply is, whether being duly admitted and enrolled as a solicitor, but not having taken out his certificate, he has practised as such within the

meaning of sections 20 and 21? It is no answer to say that he derives no profit from the business, or that he practises gratuitously without expectation of fee or reward in a particular suit, or generally. Under our Act it is the practising in any of the Courts without a certificate, which is forbidden; not merely doing so for gain or reward.

The existence of a real partnership between the appellant and the other members of his apparent firm seems therefore immaterial.

*Edmonson qui tam v. Davis*, 4 Esp. 14, is very much in point. Under the Act in question there, a solicitor became liable to a penalty if he did any act &c., for or in expectation of any fee or reward, without obtaining and entering a certificate.

The defendant being in fact in partnership with another solicitor, and not having taken out a certificate, the writ of summons was issued in his name as solicitor in a cause, in the costs and fees derivable from which he had no interest. Lord Kenyon disposed of the latter point which is not material with us, by saying that he might have a benefit from the suit in some other way, or by means of some other arrangement in the partnership and added:

“But he has held himself out to the world as the attorney in the cause, and I think he would be deemed so.”

The decision cannot be waived aside as a mere *nisi prius* one. It has never been disapproved of, and the judgment having been afterwards affirmed in error the ruling at the trial must have been at least submitted to. If the appellant's nominal partners had issued the writ of summons in his name alone, or in the firm name, could he have said that he was not practising as a solicitor, though really doing nothing more than permitting his name to be used by or for the benefit of another solicitor? I think he could not. (See the Rules O.J. Act 29-30 as to disclosure by solicitors and plaintiffs.) Here the writs are said to have been issued in the name of another member of the firm, but the firm name is used in the subsequent proceedings. I cannot see that

this makes any difference. It is much more than advertising. It is in my opinion practising in the Courts within the meaning of the Act. I think the Act does not enable a solicitor, himself uncertificated, to permit his name to be used by another as that of a practising solicitor. I agree with Wilson, C. J., that that is "practising within the Act, for every time his name is indorsed upon the law proceedings as one of the solicitors carrying them on it is the same as if he were standing by and directed his name to be so used, and in effect the same as if he were to write the name of the firm."

Mr. Justice, now Chief Justice Armour, who dissented in the Court below, seems to have taken a somewhat different view of the facts, observing that advertising is not practising, in which I fully agree. But the advertisement and other evidence identified the appellant as one of the "MacDougall, MacDougall & Belcourt," whose name was used in legal proceedings in the Courts with his assent, and shewed that it was not a mere arbitrary name or sign adopted by two of them as the title of the firm.

With the view I take of the evidence, I think the case comes within the meaning of sections 20 and 21, without invoking the aid of section 8, sub-section 38 of the Interpretation Act which is applicable even to enactments of a penal nature.

The case of *Stephenson v. Higginson*, 3 H. L. Cas. 638, was relied upon by the solicitor, more I think as an instance of the application, in a somewhat analogous case, of the rule that penal statutes are to receive a strict construction, than for any direct bearing it has upon the case in hand. There it was held that a person who was the Registrar of the Ecclesiastical Court, but was not a proctor, was not liable to the penalties imposed by the Proctor's Act 59 Geo. III. ch. 9, for doing certain kinds of business, which although commonly done by proctors was not such as in the words of the Act "appertained," or as the Court interpreted the expression, was properly incidental to the office of a proctor, and therefore might be done by anybody.



I cannot agree that we at all contravene the principle of the decision by holding that an uncertificated solicitor who allows his name to be used by another as that of a solicitor practising in the Courts may be properly said to be himself a practising solicitor within the meaning of the Solicitor's Act.

I would, therefore, dismiss the appeal.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

BURTON, J. A.—I agree with the learned Chief Justice of the Queen's Bench Division that the penal clauses of the R. S. O. ch. 140 do not apply to the appellant.

It is quite clear that he is not brought within the letter of the Act, for it is conceded that he never has since the formation of the firm practised personally, or derived any of the fees or emoluments derived by the firm from the practice carried on by the two members constituting the firm.

I do not at all question that by the course pursued he may, by allowing his name to be used as a member of the firm, be liable for moneys collected by the firm, or even for negligence, but that is a liability dependent upon wholly different considerations.

Business was carried on in this city for many years in the name of Robert Baldwin & Son, long after the late Attorney-General the Hon. Robert Baldwin and his father, had retired, and from what many of us know of the character of Mr. Baldwin, we may be sure that he would never have allowed it to be done, if he thought that there was any impropriety or illegality in doing so.

But I should require very strong authority for holding, especially in a penal statute, that the words "practises in any of the Courts," were to be construed as meaning holding himself out to the world, or allowing himself to be held out to the world, as a practising solicitor.

I refer to *Stephenson v. Higginson*, in the House of Lords, not in consequence of its applicability in some of

its facts to the present case, but for the very clear rule laid down by the Lord Chancellor for construing Acts of Parliament :

“In all,” he says: “I apprehend every word must be understood according to its legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense. That is the general rule. But, in a penal enactment, when you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense must plainly appear.”

I do not mean that we ought even in the construction of a penal statute to give the words the narrowest meaning of which they are susceptible. What is meant by it is, that Acts of this kind are not to be regarded as including any thing which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the Legislature. Our law, says Best, C. J., in *East India Interest*, 3 Bing. 193, will not allow of constructive offences. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty.

It would be extremely wrong, says Abbott, C. J., in *Regina v. Bond*, 1 B. & Ald. 392, that a man should by a long train of conclusions be reasoned into a penalty where the express words of the Act of Parliament do not authorize it.

I do not think the question is at all affected by our Interpretation Act declaring that all Acts and every provision or enactment thereof shall be deemed remedial, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best insure the attainment of the object of the Act according to the true intent, meaning, and spirit thereof. I think this is merely putting in statutory form what the Courts of modern times have over and over again laid down as the proper rule of interpretation.

But what was the object of the Act? I agree with Chief Justice Sir Adam Wilson, that it was to secure a revenue to the Law Society by compelling all practising attorneys to take out a certificate, and paying the annual fee therefor. It was not to prohibit a person allowing a practising firm of solicitors to continue the use of his name.

It may well be that any one with a keen sense of honor, if the matter was brought to his notice, might hesitate about allowing his name to be used as in this case, from the reflection that he might be inducing people to bring their business to the firm under the impression that it would receive his personal attention and consideration; but that there is room for a difference of opinion upon this question is obvious from the fact that the late leader of the bar to whom I have already referred, than whom a more high minded and sensitive man never lived, thought it not inconsistent with his dignity and high position to do so. However that may be, it is a question upon which I assume that the Law Society has power to deal; it can be no reason for straining the words of an Act of Parliament so as to make that an offence punishable in this summary and severe way, which is not included in the plain and ordinary sense of the words used.

The case of *Edmonson v. Davies*, 4 Esp. 14, referred to by Wilson, C. J., is, I think, very clearly distinguishable.

There the defendant was actually practising as an attorney in partnership with another attorney, receiving his share of the profits, but by an arrangement between them the other partner was to receive all costs arising from business done for his own connexions; and the evidence shewed that in the particular suit for the proceedings in which that action was founded was commenced and prosecuted by the other partner for his sole benefit only. He was a member of the firm actually carrying on business as a practising attorney, and although I should have thought it open to question whether under the peculiar wording of that statute, the particular act in respect of which the

penalty was sought to be recovered warranted the recovery, inasmuch as that particular suit was not carried on by the defendant "in expectation of any fee or reward," those being the words of the Act, yet the fact was that the two were carrying on the practice of attorneys for fee or reward, and the arrangement as to one exclusively enjoying certain of those fees, was perhaps not different in principle from an agreement to divide the profits in a certain proportion. It was a nisi prius decision, and although afterwards carried to the Exchequer Chamber on another point, it is no authority for this defendant being liable in the present proceeding.

I am of opinion, therefore, that the appeal ought to be allowed, and the action dismissed, with costs.

*Appeal dismissed, with costs.*

BURTON, J. A., dissenting.

(This case has been since carried to the Supreme Court).

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## COYNE V. BRODDY ET AL.

*Trustee and cestui que trust—Statute of limitations.*

In 1877, defendant B., who was engaged in a general business collecting and investing money, having become aware that plaintiff held some promissory notes of one F. for whom B. was effecting a loan, suggested that plaintiff should hand over the notes to him as money was going through his hands for F. and that he would collect them and save the amount for herself and children. Plaintiff having acted on such suggestion and the money having been received by B. in that year was retained by him until 1886 when he became insolvent and made an assignment under the Act to trustees, who in distributing the assets refused to recognise the plaintiff's claim, and pleaded the statute of limitations to an action brought to enforce payment.

*Held*, reversing the judgment of the Chancery Division (13 O. R., 173) that the transaction was such as created the relation of trustee and cestui que trust between the plaintiff and B., and that the right to recover from B's estate was not barred by the lapse of time.

THIS was an appeal from the judgment of the Chancery Division refusing the plaintiff's application to set aside the judgment of Cameron, C. J., dismissing this action with costs, delivered at the trial thereof at Brampton, in September, 1886.

The facts appeared to be that the plaintiff, a widow, was in 1877, the holder of three promissory notes amounting in all to \$500, the last of which was due 15th June, 1880, made by one Fletcher to the plaintiff.

That defendant Broddy, being her intimate and trusted friend, was aware that she held these notes and in or about that year represented to her that he was having business dealings with Fletcher, and could collect the amount of these notes from him out of an advance he was making to Fletcher, if she would entrust the notes to him for that purpose; and in compliance with his request she entrusted Broddy with the notes, for the special purpose of receiving the amount thereof from Fletcher for her and to account to her therefor, which he undertook to do; and that he realised the amount in the year 1877, and delivered up the notes to Fletcher, but never accounted to plaintiff or paid the same save \$75 paid on account.

It further appeared that Broddy in 1886, being insolvent, executed a deed of assignment of his property to his co-



defendants McFadden and Graham in trust to be realised and distributed ratably amongst his creditors.

That pursuant to notice given to McFadden and Graham, the plaintiff filed her claim with them but they repudiated it and refused to recognise it as a claim against the estate.

The plaintiff claimed from Broddy the balance due with interest; and from McFadden and Graham her proper dividend out of the estate.

The defendants McFadden and Graham defended, relying principally on the Statute of Limitations.

The facts are more fully set forth in the report of the case in the Court below, 13 O. R. 173.

The appeal came on to be heard on the 6th February, 1888.\*

*Bain*, Q.C., for the appellant.

*J. H. McDonald*, Q.C., for the respondents.

March 6, 1888. PATTERSON, J. A.—The view of Broddy's position, upon which the judgment of the late Chief Justice of the Common Pleas at the trial, and that of the Chancellor in the Divisional Court proceeded was, that he received from Fletcher, out of the money lent him on mortgage by Beattie, the amount of Fletcher's promissory notes, as agent for Mrs. Coyne, and for the purpose of handing over the money to her. He was regarded simply as a debtor to the plaintiff for the amount so received, and therefore entitled to set up the Statute of Limitations as a bar to this action.

In the opinion of Mr. Justice Proudfoot, who held that the money was received upon an express trust, the situation resembled that which was thus described by my brother Osler in delivering the judgment of the Court of Common Pleas, in *Cook v. Grant*, 32 C. P. 511:—

“It is not necessary, as the defendant contended, that such a trust should be evidenced by writing to prevent the operation of the statute, and I think it clear upon the

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

evidence that William Grant held this money as trustee upon an express trust for the plaintiff. He was not merely a legal debtor to the plaintiff in respect of it. He had been entrusted with it for her. As he himself expressed it, he was taking charge of it for her. He had received and was holding it expressly for a particular purpose, namely, for her benefit, and nothing more was wanting to place him in a fiduciary position towards her in respect of it: *McFadden v. Jenkyns*, 1 Ph. 133; *Stone v. Stone*. L. R. 5 Ch. 74; *Cameron v. Campbell*, 27 Gr. 307; *Foley v. Hill*, 2 H. L. C. 28, 35; *Banner v. Berridge*, 18 Ch. D. 254."

We are indebted to the Chancellor and to Mr. Justice Proudfoot for their carefully considered judgments, in which all the cases necessary to be referred to are reviewed, and I gather from them that the difference of opinion which existed is upon a question of fact rather than of law.

The fact to be ascertained is upon what terms was the money received and held by Broddy, and the evidence from which the inference of fact has to be deduced is remarkable for the indefinite accounts which are all the witnesses are able to give of a matter concerning which there ought not to have been any uncertainty.

From my examination of the evidence I agree with Mr. Justice Proudfoot that Broddy received the money to hold it for Mrs. Coyne, not to pay it at once over to her; and I think the proper inference from all that we are told is that he was to invest it for her, not to keep it laid up in a napkin.

Mrs. Coyne had sold a house to a Mr. Fletcher, and had taken his promissory notes for part of the purchase money, taking no security. She probably had a vendor's lien on the property, but it is also probable that that was not thought of.

Mr. Fletcher was about to borrow some money, through Mr. Broddy, on a mortgage of the property, and at Mr. Broddy's suggestion he borrowed enough to pay off the amount of his notes to Mrs. Coyne. The unpaid notes seem to have amounted to \$500. They were not yet due,

and they were held for Mrs. Coyne by her brother, Mr. Scott.

According to Mr. Scott's evidence, Mr. Broddy said to him that he was arranging a loan for Mr. Fletcher, and if Mr. Scott would give him the notes he thought he could save them for the widow and orphans out of that money. Mr. Scott gave him the notes and he received the amount of them from Mr. Fletcher by retaining it from the mortgage money which passed through his hands.

Mr. Broddy is thus described by Mr. Scott, and Mr. Fletcher says substantially the same thing, "he was bailiff of the Division Court occasionally; and I think he was general agent for everybody, for everything nearly; to a great extent handling money for different people; he did general business for a great many people, a money business, the collection and investing of money."

He had interested himself for Mrs. Coyne after her husband's death, taking an active part in arranging her affairs, getting her husband's creditors to release their debts or assign them to her, and in other ways aiding in saving for her benefit what could be realized for her from her husband's estate.

After Mr. Scott had handed over the notes to Mr. Broddy, and had heard from him that he had carried through the proposed arrangement with Fletcher, he seems to have given no more attention to the matter, but to have left it in Broddy's hands. He was asked: "Had you any reason to suppose that money was not safe in Mr. Broddy's hands?" and answered, "None whatever. I looked upon it as about the safest place in Brampton."

The transaction was in 1877, apparently in February. The trial took place in September, 1886.

Mrs. Coyne received from Mr. Broddy—eight or nine years ago, as she said at the trial, which would therefore be not later than September, 1878—a sum of money which she thinks was \$30, but she is not certain that it was not \$50. Mr. Scott thinks that she told him at the time that it was \$50. She had been wanting money and had at his suggestion written to Mr. Broddy for some.

This seems to have been the only payment in respect of these moneys.

A cheque for \$25, given by Mr. Broddy to Mrs. Coyne in 1884, is marked "loan," and neither she nor Mr. Scott, who wrote the cheque, is able to give any explanation concerning it.

I read another passage from Mr. Scott's evidence :

"Q. Was any application made to Broddy for repayment of this money since 1877, do you know? A. Not as far as I know; I made none.

"Q. Why not? A. Because I thought he was taking care of the money for Mrs. Coyne, and I thought it might come in when she might need it worse.

"Q. Did you know the interest was not being paid? A. Yes.

"Q. During all these years? A. During all these years."

I do not know what force to give to the expression "all these years."

The payment of \$30 or \$50 in 1877 or 1878 may or may not have been interest. All we are told of it is, that Mrs. Coyne wrote for money, and the remittance was sent to her.

Mrs. Coyne adds nothing to her brother's account of the transaction with Broddy. She had left the notes in her brother's hands, and did not meddle in the matter afterwards, knowing nothing of what was done beyond what he told her.

No further information from the books of Broddy, if he kept any, or from any other source, is produced.

We have then to deal with such facts as the evidence discloses.

We have Mr. Broddy, whose business was to act for others in investing moneys, who was acting in that capacity for Mr. Beattie, whose money he lent to Fletcher, and for many others, and who was a trusted friend of the plaintiff, receiving on her account \$500 for the three current notes, saving that money, as he expressed it, for the widow and orphans, entrusted with it in confidence of its being safe with him, no demand of it being made for the reason given



by Mr. Scott, who was not a man unacquainted with business matters, that he was taking care of it for Mrs. Coyne, Mr. Scott regarding it as a fund that "might come in when she needed it worse."

The conclusion seems to me a matter of course that Broddy had the money to invest for Mrs. Coyne. Badly off, as she is said to have been, she did not need to break in upon this fund for any immediate wants.

This is shewn by Mr. Scott's answer, just referred to, and from the fact that when she wanted money she asked for it, and got it. The \$25 cheque, which was called a loan, but which she was never asked to repay, may have been a loan only in the sense of being an advance of cash at a moment when there was no cash of hers actually on hand.

If the \$500 had been handed over by Mr. Broddy to Mrs. Coyne she would have had to give it to some one to invest for her, and why should she have preferred a stranger to the friend who, in acting for her, was acting in the line of his ordinary business?

I am not pressed with any difficulty from the fact that so many years passed without money being asked or paid for either principal or interest, or from the incident of the so called loan in 1884.

The obvious and most forcible argument to found on those facts is, that Broddy had no money belonging to the plaintiff, either having never had any or having paid it all over. But there is no such argument advanced.

It is unfortunate that Mr. Broddy's own evidence is inaccessible. It may reasonably be presumed that he would have been able to clear up what now causes some perplexity; but drawing from the evidence we have the inferences to which it seems properly to lead, my conclusion is that the money was held on an express trust, and that we should allow the appeal.

OSLER, J. A.—It has not been argued or even suggested, either that the defendant Broddy did not receive the amount of the plaintiff's notes, or that he paid it over to



her or to any one for her. That being so, it is not a violent inference from the evidence that he received and retained it on an express trust, namely, to take care of and invest it for the plaintiff. It is indeed a much more probable inference than that the plaintiff permitted a sum so important to one in her position, to remain so long in Broddy's hands without any understanding at all.

I therefore agree with Mr. Justice Patterson that the Statute of Limitations cannot be set up as a defence to the action.

The plaintiff should have judgment against Broddy for the amount of the notes and interest, and against the other defendants requiring them to admit her claim and place her upon the dividend sheet as a creditor for the amount thereof.

HAGARTY, C. J. O. and BURTON, J. A., concurred.

*Appeal allowed with costs.*

[As bearing on this case, see *Dooby v. Watson*, 39 Ch. D. 178.]

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## CLARKSON V. THE ONTARIO BANK.

## EDGAR V. THE CENTRAL BANK OF CANADA.

## KENNEDY V. FREEMAN.

## HUNTER V. DRUMMOND.

*Constitutional law—48 Vict. ch. 26 (R. S. O. ch. 124) B. N. A. Act, sec. 91—“Bankruptcy and insolvency”—Sec. 92, “Property and civil rights in the Province.”*

In actions by assignees for creditors under 48 Vict. ch. 26 (O.), and amendments (now R. S. O. ch. 124) to impeach transactions as fraudulent and void, under that statute, the Court was evenly divided as to the constitutional validity of the Act.

*Per* HAGARTY, C. J. O., and OSLER, J. A.—The statute which is one of general application for the disposition of insolvent estates must be regarded as a whole and is *ultra vires* as being legislation on the subjects of bankruptcy and insolvency.

*Per* BURTON and PATTERSON, JJ.A.—The matters dealt with by the statute come clearly within the definition of “Property and civil rights in the Province.”

*Per* BURTON and PATTERSON, JJ.A., also, (in *Clarkson v. The Ontario Bank*), sub-sec. 3 of sec. 3 of 48 Vict. ch. 26 (now repealed) did not vest in an assignee the right to maintain an action to recover back moneys paid by a person in insolvent circumstances within one month of an assignment by him under the Act.

*Per* BURTON, J.A. (in *Kennedy v. Freeman*), sec. 2 of 48 Vict. ch. 26 (now R. S. O. ch. 124, sec. 2), should be read as intended to invalidate any act fraudulent in the sense of being a violation of the statute if it has the effect of defeating or delaying creditors or giving one or more of them a preference over others.

*Semble, per* OSLER, J.A. (in the same case) the meaning of sec. 2 is, that when a person is in insolvent circumstances, if either the intent or the effect of the transaction is to prefer the creditor, that is all that is necessary to avoid it.

THE plaintiff was the assignee of the firm of William Kyle and Company; and in his statement of claim set forth: that that firm on the 22nd of September, 1885, made an assignment to him:

That on the 27th of August, 1885, the firm being in insolvent circumstances &c., paid to the Bank \$509.60:

That on the 28th of the same month the firm paid to the Bank \$2,900:

That on the 4th of September, 1885, the firm paid to the Bank \$2,995.97:

And that on the 12th of the same month the firm paid to the Bank \$3,000.

And the plaintiff claimed that such payments were void under the provisions of the Statute of Ontario, 48 Vict. ch. 26, as against the plaintiff and the creditors of the said firm.

The defendants demurred to the statement of claim, upon the ground that the statute did not vest in the plaintiff the right to maintain the action, and further that the Act was *ultra vires*.

The defendants also demurred to the paragraphs relating to the first two of such payments, upon the ground that the same were made before the Act came into force, and that the Act was not retroactive.

The demurrers were argued before Ferguson, J., on the 19th of January, 1887, when judgment was given overruling the first demurrer, and allowing the second.

Thereupon the defendants appealed from that part of the order overruling the first demurrer; and the plaintiff appealed from that part allowing the second demurrer; and by consent of parties the appeals were argued together on the 30th of November, and 1st of December, 1887.\*

*Moss*, Q.C., for the Ontario Bank, contended that so much of the order as directed that the demurrer be overruled was erroneous, and should be reversed, and the demurrer allowed with costs.

The plaintiff only asserted a right to sue by virtue of an assignment made to him under the provisions of the Statute of Ontario, 48 Vict. ch. 26, and shewed no other right to maintain the action, either as a creditor or on behalf of the creditors of William Kyle & Co., nor was such action framed as an action by a creditor or on behalf of creditors of that firm, and unless the respondent had a title under the provisions of the Act, he had no right to maintain this action against the Bank.

Counsel also contended that the act was *ultra vires* and beyond the power of the Legislature of Ontario to enact, the Act being legislation in respect to bankruptcy and in-

\* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

solvency, and the right to legislate with regard to these matters being exclusively vested by the British North America Act in the Parliament of the Dominion.

That the Legislature of Ontario had no power to legislate in respect to the matters assumed to be dealt with by the Act, and especially with regard to assuming to confer upon a debtor's assignee the right of maintaining actions such as the present, and assuming to deal with the estates of persons in insolvent circumstances in the manner they had been by the Act; which contained provisions and enactments based entirely upon insolvency or bankruptcy, and without the occurrence of which such provisions would be improper and unnecessary.

Under any circumstances the Act did not vest in the plaintiff the right to maintain this action, nor did it confer on him such rights, powers or authorities as enabled him to call in question the transaction mentioned in the statement of claim.

The plaintiff could only maintain this action by force of the 48 Vict. ch. 26, and that Act did not come into force until the 1st of September, 1885, and was not retroactive in its effect.

At the time of the alleged payments to the bank, referred to in the statement of claim, the payments were legal and valid, and he submitted that they were not rendered illegal and invalid by reason of the statute subsequently coming into force; and that nothing in the Act gave colour to the contention that a payment or act valid when made or done was to be rendered invalid upon the Act coming into force; and it was clear that the Act was not intended to apply, and could not be construed to apply to any payment made prior to that date.

*J. H. McDonald*, Q.C., for Clarkson. The demurrer admits that the payments in question, *i.e.* those made in August, 1885, were made under the circumstances and within the time mentioned in sub-sec. 3, of sec. 3 of the Act respecting assignments for the benefit of creditors;

and there is nothing in the Act to indicate that an assignment made within thirty days after the Act came into force (1st September, 1885), is to have a different operation and effect from that of an assignment made after that date, and the judgment in question does not give to an assignee, under an assignment made within thirty days after the passing of the Act, the benefit of this sub-section. In giving full effect to the words of this sub-section no hardship is worked in the present case. The Act was passed on the 30th March, 1885, and the proclamation bringing it into effect was issued on the 15th July, following. From that date the defendants knew that an assignment might be made under the Act on the 1st September, 1885, under which all payments made after the 1st August, 1885, would be open to attack; and in order to give full effect to the language used it is not necessary to shew that the Act has a retrospective operation: under the words of this sub-section the payments made in August, 1885, were void, and Clarkson the present plaintiff is entitled to recover the same for the benefit of the general body of creditors. Under the Act the plaintiff as assignee of the insolvent firm has a right to maintain this action, and to recover from the defendants the moneys in question or a portion thereof. He also contended that the Act was intra vires of the Legislature of the Province of Ontario, being legislation in respect of property and civil rights; and did not come within the subjects of bankruptcy and insolvency within the meaning of the British North America Act, as it did not enable a creditor, in invitum, to take proceedings for the seizure, sale, and distribution among the creditors of the assets of the debtor; neither did it provide for a discharge of the debtor: *Regina v. St. Mary's—Whitechapel*, 12 Q. B. 120; *Regina v. Leeds and Bradford R. W. Co.*, 18 Q. B. 343; *Cornill v. Hudson*, 8 E. & B. 429; *Tawler v. Chatterton*, 6 Bing. 258; *Pardo v. Bingham*, L. R. 4 Ch. 735; *Re Tate*, 5 U. C. L. J. N. S. 260, were referred to.



March 20, 1888. HAGARTY, C. J. O.—The point chiefly to be decided in these four appeals before us, is, as to the validity of an Act of the Legislature of Ontario, passed 30th March, 1885, 48 Vict. ch. 26, (O.,) entitled “An Act respecting assignments for the benefit of creditors.”

It is contended for the appellants that the Act is ultra vires as infringing the exclusive jurisdiction of the Dominion Parliament in bankruptcy and insolvency.

The preamble states “whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same.” It then repeals a couple of sections of former Acts, and by section 2, enacts that every gift, assignment, payment, &c., of goods and chattels, bills, bonds, notes, &c., or of any other property, real or personal, made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat or delay or prejudice creditors, or to give any preference, or which has such effect, shall, as against them, be utterly void.

Sec. 3. Declares this shall not affect any assignment made to the sheriff of the county, or to another assignee with consent of creditors, for the purpose of ratably and without preference paying his creditors, &c.

4th. Every assignment for general benefit under this Act shall be valid if it profess to convey all his personalty and realty, &c., and such assignment shall vest in the assignee all his realty and personalty, &c., whether vested or contingent, except such as are exempt from seizure in execution.

Sec. 5. Provides for the case of the debtor owing debts individually, and as a co-partner, and for the ranking of claims on the estate by which they were contracted, and shall only rank on the other after all the creditors of that other have been satisfied.

Sec. 6. Allows a specified majority of creditors to substitute another assignee for the sheriff.

Sec. 7. The exclusive right of suing for the rescission of agreements or deeds, &c., made or entered into in fraud of creditors shall be in the assignee, and provides for the case of the assignee declining to prosecute a claim; by leave of the judge a creditor may after indemnifying the assignee use his name and obtain the exclusive benefit of the suit, &c.

Sec. 8. Allows the recovery of money or goods, or proceeds thereof, if sold, from any person who received them from the assignor under circumstances prohibited by sec. 2.

Sec. 9. An assignment under the Act shall take precedence of all judgments and executions not completely executed by payment.

Sec. 10. Allows a Judge to amend or correct any mistake, defect, or imperfection in a deed of assignment.

Sec. 16. Directs the assignee to convene a meeting of creditors in five days for the appointment of inspectors and providing for the disposal of the estate.

Sec. 17. Provides for the voting of creditors by proxy or personally, but not to vote without filing an affidavit of claim.

Sec. 18. Provides for the number of votes on a scale relative to the amount of claim. \* \* Creditors, on making proof, to state as to securities held and value the same; and assignee, with the consent of creditors, may either consent to valuation and proof for balance, or require assignment of security at an advance of 10 per cent. over specified value, &c. \* \* Then follow directions as to negotiable paper, on which the debtor is only indirectly or secondarily liable; this must be valued also.

Sec. 19. Holders of claims not accrued [qu. matured,] may prove and vote, but interest to be deducted for the time it has to run.

The following session, 1886, ch. 25, was passed, making certain amendments as to payments by a debtor, and as to securities held by creditors before assignment; and as to securities given for pre-existing debts.

Sec. 4. Provides that when a new assignee is appointed under the Act, the estate shall vest without transfer, with

provisions as to dividend sheets and after notices to creditors, and power to pay dividends on all claims not objected to within a named time.

In the session of 1887, a second amending Act, ch. 19, was passed. Sec. 2, as to sales and payments; that payments or transfers made of property validly obtained by a purchaser to a creditor, should be void against the creditor to whom it was made, if under circumstances which would avoid it if made directly by the debtor.

Sec. 3. Every assignment not void by sec. 2 of the first Act not made to the sheriff or an assignee with the creditors' assent, shall be void as against a subsequent assignment made in conformity with the Act.

Sec. 6. If a creditor claiming to rank, does not within reasonable time furnish proofs, the Judge on the assignee's application may notify him to the Judge's satisfaction, and if the creditor make default, he shall be wholly barred of any right to share, and the assignee may distribute the estate as if no claim made; the debtor remaining liable.

Further provision is also made for contestation of claims, and for calling meetings, and by sec. 11 if a sufficient number of creditors do not attend, the County Judge may give all necessary directions as to disposal of the estate.

In *Clarkson v. Ontario Bank*, the assignment was made under the first Act on 22nd September, 1885, which came into force 1st September, 1885.

In *Edgar v. Central Bank*, assignment made 13th July, 1886, after the first amending Act.

In *Hunter v. Drummond*, assignment 15th July, 1886; *Kennedy v. Freeman*, assignment 7th June, 1886. The three last named cases being since the first amending Act.

The appellant says that this Act is ultra vires, as trenching on the subjects of bankruptcy and insolvency, reserved for the exclusive jurisdiction of the Dominion Parliament; that it is to all intents a law for the judicial administration of an insolvent's estate by means unknown to the common law, and conferring rights on an assignee in addition to and beyond all rights assigned to him by the debtor.

The respondents deny this, and insist that the law falls within the right of legislation as to property and civil rights; that it does not enable a creditor to take proceedings, in invitum, for the distribution of the estate, and does not provide for a discharge of the debtor.

The question is of very serious import, and requires our gravest consideration.

Taking the last objection first, I cannot consider it of substantial force. An Act can, I think, be unquestionably a Bankrupt or Insolvent Act in substance, without any provision for discharge. The earliest Bankrupt Act of Henry VIII., and several Acts following it, made no provision for discharge; that merciful relaxing of the law was first heard of in Queen Anne's reign, after the lapse of nearly two centuries.

Insolvent Acts, down to the end of their separate existence, were chiefly for the protection of the debtor's person, and did not protect his after acquired property.

The two classes of Acts have been characterised by writers as compelling the debtor to become bankrupt; the other enabling the debtor at his own instance to obtain protection and relief.

I believe the 6 Geo. IV. was the first Act allowing the debtor "to be accessory to his own bankruptcy by authorising a commission to issue at the instance of a creditor upon a declaration of insolvency by the debtor; or in other words, it authorized a concerted bankruptcy which had previously been regarded as a fraud on the bankrupt law."

When the B. N. A. Act was passed in 1866, the Bankrupt and Insolvent Act then in force in England, was that of 1861.

By that the debtor could file his declaration of insolvency which a creditor could treat as an Act of bankruptcy. Sec. 86, allows the debtor to petition for adjudication against himself, and on adjudication, he and his estate become subject to the law of bankruptcy.

The Canadian statute then in force, which was that of 1864, provided fully for a debtor becoming subject to the law by



a prescribed voluntary assignment, and among the specified acts of bankruptcy is a general conveyance of his property for his creditors, other than as prescribed by the Act.

It is a well-known fact that under that statute, the very largemajority of bankruptcies were founded on the voluntary assignment of the debtor.

I entertain the opinion that an Act providing for the judicial administration of insolvent estates is not the less an Act on bankruptcy and insolvency, because it happens that it only provides for the application of its provisions to the case of persons voluntarily putting it in operation, or because it does not provide for compulsory liquidation on named acts of bankruptcy.

The law-making power may, in its discretion, limit or widen the means of putting the Act in motion, but what we have to look to is its general object and effect.

The general object and scope has been often stated as in 2 Kent Com., sec. 390.

“The general principle that pervades the English bankrupt system, is equality among creditors who have not previously and duly procured some legal lien upon the estate of the bankrupt; and in order to allow and preserve that equality as soon as an act of bankruptcy is committed, the bankrupt estate becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it.”

There is a very good summary of authorities in 1 *Bouv. Law Dictionary*, p. 807, title, “Insolvency.”

The latter term is much larger than that of bankruptcy; it “enlarges the sense;” *Parker v. Gossage*, 2 C. M. & R. 617.

“The bankrupt law is entirely an innovation on the common law, which left the creditors of an insolvent debtor at liberty to take such proceedings as they could by means of the ordinary process of the Courts for the recovery of their debts, and made no provision for securing and distributing the estate of the debtor for the equal benefit of his creditors or for relieving the debtor,” &c.

“The great object of all bankrupt or insolvent laws is to distribute the property of a debtor who is unable to pay



his debts in full among his creditors by judicial proceedings in which all may be heard, and to discharge his property acquired afterwards, or at least his person," &c.: *Bump* on Bankruptcy, 210.

In delivering the judgment of the Privy Council, in *Cushing v. Dupuy*, 5 App. Cas. 409, Sir Montague Smith, says: "It would be impossible to take a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency."

The point for decision in that case did not touch the question before us.

This language is also quoted by my learned predecessor in this Court, in *Peek v. Shields*, 6 A. R. at p. 642; and also by my brother Osler, in the same case in the Common Pleas.

The elaborate judgment of Chief Justice Marshall, in *Sturgis v. Crowninshields*, 4 Wheat. 193, is well worthy of perusal, as to the rights of the several States to pass bankrupt and insolvent laws, and the constitutional power of Congress to pass a uniform bankrupt law, and as to the respective signification of the terms "bankruptcy," and "insolvency." The constitution allowed "the passing of uniform laws on the subject of bankruptcies." He says:

"The line of partition between them is not so distinctly marked as to enable any person to say with positive precision what things exclusively belong to one and not to the other branch of laws. \* \* If an Act of Congress discharged the person of the debtor, but left his future acquisitions liable to his creditors, we should feel much hesitation in saying this was an Insolvent, not a Bankrupt Act." Again at p. 199: "It is not admitted that without this principle (discharge of obligation) an Act cannot be a Bankrupt Act."

I refer to this celebrated judgment as in point here, this Act being, it is argued, not either a Bankrupt or Insolvent

Act from its not making certain common provisions as to discharge from existing debts, compulsory bankruptcy, &c.

It must be borne in mind that when Chief Justice Marshall spoke (1819) there was no such thing known as voluntary bankruptcy.

I entertain a strong opinion that if Congress had passed a uniform Act for the distribution of insolvent estates in a special administration not warranted by the common law, and had only provided one way to bring a debtor under its provisions, say *e.g.*, omitting to pay a debt within a named time on demand, naming no other act of bankruptcy, that the Supreme Court would not have held it unconstitutional as not coming within the provision in the constitution, and Chief Justice Marshall considers that the omission of a release to the debtor would not affect it.

To apply this here, our Parliament can exclusively deal with "bankruptcy and insolvency," a wider jurisdiction in terms than that given to Congress. Could it be successfully argued that an Act providing for the administration of insolvent estates on principles overriding the common law, not providing for any discharge of the debtor, and applying its provisions only to the voluntary act of the debtor in making a prescribed form of assignment, but open to all debtors in the Dominion to take such course, would be *ultra vires* of Parliament?

I think the answer would be that a legislature authorised to legislate exclusively in bankruptcy and insolvency could do so, either by confining their Act to voluntary and excluding compulsory liquidation, or vice versâ, with or without discharge.

The Act might, in the opinion of many, be incomplete and narrow, but could it be considered for either reason to be *ultra vires*?

The words "bankruptcy" and "insolvency" seem to embrace the whole subject as to the inability to pay debts, the existence of a number of creditors and the necessity of providing means for fair and equitable distribution of assets and the prevention of fraudulent and unjust preferences.

We know how the law stood both in England and Canada when the Federation Act was passed, that old distinctions between bankruptcy and insolvency as separate systems had disappeared, and voluntary as well as compulsory bankruptcy existed.

It was natural that to ensure something like uniformity in the disposition of assets of debtors throughout provinces so intimately connected in commercial relations, the exclusive right to legislate, should be vested in the central authority.

In *Valin v. Langlois*, 5 App. Cas. 119, Lord Selborne says : "If the subject matter is within the jurisdiction of the Dominion Parliament it is not within the jurisdiction of the Provincial Parliament, and that which is excluded by the 91st sec. from the jurisdiction of the Dominion Parliament is assigned exclusively to the legislatures of the provinces."

Here the subjects in question are given exclusively to the Dominion.

*L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31, is an instructive case. An Act of Quebec for the relief of a bankrupt society in financial embarrassment, referring solely to its affairs and imposing a forced commutation of existing rights upon two annuitants, was held to be a matter of a local and private nature within the provincial cognizance, and not falling within the category of bankruptcy and insolvency.

Lord Selborne, in answer to appellant's contention, says : "The question is, whether this is a matter coming under class 21, of bankruptcy and insolvency ? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation ; such legislation as is well expressed by Mr. Justice Caron, when he speaks of the general laws governing *Faillite*, bankruptcy, and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized

countries, are perfectly familiar. The words describe, in their known legal sense, provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law has been brought into operation, the manner in which it is to be brought into operation and the effect of its operation."

He notices an argument of Mr. Benjamin, suggesting the case of a law being previously passed by the Dominion that any association of this particular kind on certain specified conditions exactly like those in the case for judgment should, ipso facto, fall under the legal administration in bankruptcy or insolvency. If such a law had been passed, their Lordships were not prepared to say it was beyond their competency, nor that it would be competent for the Provincial Legislature afterwards to take the association "out of the scope of the general law so competently passed by the authority which had power to deal with bankruptcy and insolvency." He notices that the whole scope of this particular Act was to keep the society out of insolvency.

In connection with this branch of the case, we may notice the Acts of the Dominion Parliament for the winding-up of insolvent banks, insurance and trading companies, passed after the general Insolvency Act had lapsed. These Acts are confined to certain specified classes of companies, and do not apply to individuals. If it be urged that parliament could not pass an Act confined in operation to only one province, the alternative would seem to be inevitable that, assuming this Act to be valid, each of the six or seven provinces could pass an independent Insolvent Act of its own. This could hardly have been contemplated at confederation.

I do not consider that such limited application is any objection to the right of Parliament to enact them as being legislation on bankruptcy and insolvency.

I only make this reference as bearing on the respondent's objection as to the partial nature of the local Act now before us; and it is suggested to my mind by



Lord Selborne's language already cited, as to Mr. Benjamin's argument in *L'Union St. Jacques' Case*.

In my view a law is no less a law for the disposition of insolvent estates as they are dealt with here, because it is limited in its operations to a certain class of the community, or that it provides only one avenue, viz., an assignment by which it can be approached.

It must be borne in mind that we are not dealing with an isolated Act of local legislation, such declaring that the assignee under a voluntary assignment shall have the higher right; for example, the same as a creditor or for the creditors, to impeach any fraudulent act or gift, conveyance, or assignment, &c., of the assignor's estate. We are not dealing with each section as if it stood by itself, but we are dealing with an Act of general application; dealing with the whole estate, regulating the administration, interfering with existing legal priorities, prescribing modes and times for distribution, &c.

The Act of course only applies to one Province.

The case of *Regina v. Chandler*, is a decision of the Supreme Court of New Brunswick in 1868, reported in Mr. Cartwright's very useful work, vol. ii. 421. The unanimous judgment of that Court pronounced by Ritchie, C. J., now Sir Wm. Ritchie, Chief Justice of our Supreme Court, goes far to support the appellant's contention before us.

In March, 1868, after confederation, the local Legislature passed an Act amending an Act of their own passed before confederation respecting "Insolvent Confined Debtors."

The amending Act provided that any one imprisoned in a civil suit, might apply for his discharge to a Judge, and if it appeared he had no property and that he had not transferred any property to defraud the plaintiff, or to give an undue preference, the Judge might order his discharge, and witnesses might be examined.

The Act of which it was an amendment, is much to the same effect, allowing the defendant in civil suits to apply for discharge from goal, and to require the payment of a



weekly allowance to indigent debtors. In fact very similar to Acts in force for a great number of years in Ontario.

The learned Chief Justice very fully reviews the B. N. A. Act, and pronounces a most decided opinion that the Judge under the amending Act must be prohibited from acting under it for the examination of the debtor with a view to his discharge.

He says :

“That branch of the insolvent system which the local legislature has attempted to alter is, it is true, exclusively applicable to insolvent confined debtors, but it is not the less a matter relating to insolvency, and we are at a loss to understand how it can be argued that it is not a matter coming within that class of subjects, viz., bankruptcy and insolvency, enumerated in the B. N. A. Act, as assigned exclusively to the Parliament of Canada.”

It is not necessary for us to adopt this view of the law as binding upon us, or as a guide to us in this case.

I also refer to *Re Wallace Huestis Grey Stone Co.*, 3 Cart. 374; *Russel's* Equity Report, 461, N. S. ; *Murdoch v. Windsor and Annapolis R. W. Co.*, 3 Cart. 368.

The Act now in question, does not legislate merely in furtherance of a disposition by a debtor for the benefit of all his creditors ratably. It applies to such an instrument an effect far beyond the principles of the common law. By the latter, the assignee can take no other or higher right than the debtor could convey.

Here, the assignee, not a creditor, is specially empowered to contest in a new right the acts and dealings of the debtor prior to the conveyance—a right naturally and almost necessarily given in an insolvent Act. It gives the assignment priority over judgments and executions not executed by payment.

It then prescribes the mode of administering the estate, with many provisions for making an ordinary insolvent law, as to ranking on the estate, proof of claim, number of votes allowed to claimants, production and valuation of securities, and power to take them from creditors at a named rate, dividends, notices, &c., and by the second last amend-

ing Act passed since these assignments, creditors are barred as to any right to share in the estate on failing to prove a claim in a named time after notice.

I have already intimated my opinion that if the Dominion Parliament had passed a law, based on the lines of this Act, in substance providing that on making an assignment as prescribed, any one would come under the provisions of this Act, it would be legislation within their competence as relating to and included in the words or subjects of bankruptcy and insolvency.

It seems to me that if the Act before us be *intra vires* of Ontario as not coming under the exclusive right of the Dominion, it must be held on the same chain of reasoning to be *ultra vires* the legislative power of the Dominion.

An Act, in my opinion, is no less an Insolvent Act because it is deficient in some of the usual provisions of insolvency legislation.

The main purpose of the enactment must be looked to ; this I consider to be the administration and disposition of insolvent estates by peculiar and extraordinary provisions and principles well known in such cases, but foreign from and opposed to the ordinary laws that govern the debtor and his creditor.

If the law affect to provide for this object in this way it seems to me to fall within bankruptcy and insolvency as subjects referred to in our Federation Act.

This Act is open to the whole debtor world, to be applied on assignment, executed on the debtor's own volition, or on the urgency or pressure of his creditors.

If we hold this Act not to be within the prohibited subjects because it only provides for one way of bringing it into operation, and omits all compulsory applications, then the legislature could pass another Act providing for its compulsory operation on acts done or suffered by the debtor, which Act would be upheld on the same line of argument urged to support the present Act. If the forbidden ground be invaded to any partial extent by one enactment and to another, or to the remaining extent by another, the law must be held to be violated.

By our Creditors' Relief Act of 1880, if a debtor leave an unsatisfied execution in the sheriff's hands for a named time, all his creditors may file claims which on proof as directed, are to have the force of judgments and executions, and entitled the creditor to share as an execution creditor both in the property seized and all future seizures which the sheriff may make, so long as there are claims filed to be satisfied, and all priority in executions is abolished, and may obtain attaching orders against all debtors to the execution debtors, &c. ; all the debtor's realty and personalty in the county may be thus reached.

This Act in effect makes the debtor suffering an execution to remain unsatisfied, liable to have the whole of his estate at once applied to pay equally all his creditors who bring in claims.

I wish to be distinctly understood as expressing no opinion as to the legality of any statute except that before us. I necessarily refer to it as arguments were addressed to us, as to the incompleteness of these Acts as insolvent Acts, and to illustrate my view as to how by piece meal (as it were) legislation can thus, in substance and effect, provide a system for dealing with insolvent estates in a manner capable of application to the vast majority of cases of a debtor in insolvent circumstances.

My judgment does not turn on any objection to secs. 1 and 2, which at present seem to me to be in themselves not open to question.

I feel constrained to the conclusion that any Act of general application open to all insolvent debtors by a specified proceeding, which provides for the distribution by judicial administration of the estate on a system overriding ordinary civil rights and remedies, and giving higher rights to an assignee than the debtor could confer, and barring claims on the whole of such estate unless made as directed by the Act, is a law directly on the subject of "bankruptcy and insolvency," which subjects are under the exclusive jurisdiction of the Dominion Parliament, and that the absence of a general discharge from liability, or of

a provision for compulsory liquidation cannot make it the less within such exclusive jurisdiction.

A half bankrupt or a half insolvency law is equally within the prohibited legislation as a more complete and comprehensive measure would be.

BURTON, J. A.—Two points were raised by the appellants.

First. That the Act 48 Vict. ch. 26, (O.) was *ultra vires*.

Second. That in any event the Act does not vest in the plaintiff the right to maintain this action.

I have stated my reasons in another case for holding that the Act is *intra vires*, but I agree for the reasons more fully stated in my brother Patterson's judgment, that no right is conferred upon the assignee to sue for the recovery of money paid under the circumstances alleged.

The word payment found as it is in section 2 in connection with "gift, transfer, delivery over, or payment of goods, chattels, or effects," would, I think, standing alone, be held to refer to something *ejusdem generis* as the matters referred to in the same connection and to mean nothing more than a delivery of goods, &c., by way of payment, and not to payment in money to a creditor in satisfaction of a debt, and although the succeeding section may possibly extend the meaning of those words to a payment in money, if made within a month previous to the assignment, and which by section 4 is declared to be void as against the assignment, no power is given in that section, nor in section 7 to recover that money for the benefit of the estate. I think therefore that the appeal of the defendants should be allowed.

The plaintiff's appeal as to the payments made before the Act came into force was disposed of on the argument.

PATTERSON, J. A.—The statement of claim sets out that the plaintiff is assignee by virtue of an assignment made on the 22nd of September, 1885, under the provisions of the Statute of Ontario, 48 Vict. ch. 26, of the estate and effects of the firm of William Kyle and Company, who up to the 22nd day



of September carried on business as wholesale merchants at the city of Toronto; that the defendants are a corporation, duly incorporated under an Act of the Parliament of Canada; that on or about the 27th day of August, 1885, the said firm of William Kyle and Company, being in insolvent circumstances, and unable to pay their debts in full, and knowing that they were on the eve of insolvency, with intent to defeat, delay and prejudice their creditors, and to give to the defendants a preference over the other creditors of said firm or some of them, paid over to the defendants the sum of \$509.60; that the defendants were at the time of such payment creditors of said firm in the sum of \$9,500 and upwards, and said payment was made on account of such indebtedness; that the said defendants at the time of such payment well knew the insolvent circumstances of the said firm; that the said transaction has had the effect of giving the defendants a preference over the other creditors of the said firm. Similar allegations are then made respecting three other payments, one being \$2900 paid on the 28th of August, 1885; another \$2995.97 paid on the 4th September, 1885, and the third \$3000 paid on the 12th of September, 1885; and the statement goes on to aver that the assets of the firm will not realise more than sufficient to pay a very small dividend to the creditors of the firm, and to submit that the said payments are void under the provisions of the said Act as against the plaintiff and the creditors of the said firm, and to ask that it may so be declared, and that the defendants may be ordered to pay the same to the plaintiff, with interest.

The defendants demurred to the whole claim on the same grounds, touching the legislative jurisdiction, as in the case of *Edgar v. The Central Bank (a)*. They further took exception to the claim for the first two of the four payments, on the ground that they were made before the Act 48 Vict. ch. 26, (O). was in force, and added a general objection that the Act does not vest in the plaintiff the right to maintain this action.

(a) post 193.



The decision was against the defendants on the general objections, and from that decision they appeal. It was in their favour in respect of the first two payments, and from that part of the judgment the plaintiff appeals.

On the general question of the legislative jurisdiction I have nothing to add to what I have said in *Edgar's Case* (a). I think all the provisions of the Act on which the plaintiff's case depends are intra vires.

It is also clear that payments, such as those described in the statement of claim, were not avoided by R. S. O. ch. 118, and that therefore the plaintiff's appeal in respect of the first two payments should be dismissed. We decided this point on the argument.

The remaining question is, whether any of the payments are voidable under the Act of 1885?

It will, I think, appear from carefully reading the second and third sections of the Act, that the plaintiff, if he can maintain his claim, must do so under the third sub-section of section 3, and not under section 2.

That sub-section was thus expressed: "In case a payment of money is made to a creditor under the circumstances mentioned in the second section, and within one month before the execution of an assignment for the general benefit of creditors under this Act, the same shall be void as against the assignment, but not as against persons claiming in any other way."

The second section did not touch money payments, as I propose to shew by and bye. If it had included them this third sub-section would not have been required.

The third section declared that nothing in the second section should apply to, inter alia, "any payment of money to a creditor unless an assignment for the general benefit of creditors were made within one month after the payment." This language would, no doubt, suggest the inference that the second section was intended to include money payments; but that inference would not necessarily have been obligatory. It happens, however, that the third sub-section of section 3, which, as I have remarked, would have

(a) post 196.

been unnecessary if money payments were avoided by section 2, does incorporate that section, not as avoiding the payment, but as to the "circumstances," that is to say, the intent, effect, &c. The consequence of making a money payment under those circumstances, and within the month, rests wholly on the third sub-section. Thus *something* in section 2 was made to apply to money payments. But if they were made before the month, then nothing in the section was to apply to them.

Now if the payments in question had been made in the summer of 1887 instead of in 1885, there could be no pretence of their being voidable by creditors; because the Act of 1887 repealed the third sub-section, and also all the other words on the subject in section 3 except those which declared that nothing in section 2 should apply to money payments to a creditor; and in that altered state the law now appears in R. S. O. 1887, ch. 124.

The amendment is not expressed as being declaratory; but, in the absence of anything outside of the amending clause itself to indicate a change in the policy of the Act, I am encouraged by the amendment to examine the Act of 1885 more closely in order to ascertain whether on its proper construction it really sustains the plaintiff's claim.

The clause now represented by section 2 originated as I have pointed out in *Edgar's Case (a)*, in 1858. From that time down to 1885 it dealt with the case of an insolvent person who "makes, or causes to be made, any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, or delivers or makes over, or causes to be delivered or made over, any bills, bonds, notes, or other securities or property, with intent," &c.

All these subjects are of a class of assets capable of being followed and reclaimed. It was never assumed that money payments were included.

The Act of 1885, while it introduced the word "payment," adhered, in section 2, to the same class of assets enumerated in the previous Acts, though it added to the enumeration.

The language is: "Every gift, conveyance, assignment, or transfer, delivery over or *payment* of any goods, chattels or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal." Not a word of money payments in this form of the clause any more than in its original shape. The language is fully satisfied by understanding what is aimed at to be the delivery or transfer of any asset of the class described, in payment of a debt.

The only doubt at all possible arose upon the excepting words in the following section. But I have shewn that the inference, indicated by that exception, that money payments were meant to be struck at, was by no means obligatory, but was in fact counter-indicated by the third sub-section of section 3.

The plaintiff must, therefore, depend altogether on that sub-section.

I do not find that sub-section easy to understand. The payment being declared void as against the assignment, it may be that the creditor was to rank as if the debt had not been paid; but what of the money? The clause did not, like the corresponding provision in our late insolvent Acts, go on to declare that the amount might be recovered back for the benefit of the estate. Nor can the right to recover it be deduced from sections 7 and 8.

To support the present action a substantial addition to the third sub-section by way of intendment would be required.

I see no good reason for hesitation, particularly in view of the repeal which followed so closely after the enactment of the clause, in holding that the claim of the plaintiff as set out in his statement is not sustained by the statute, and I think we should on that ground allow the defendants' appeal and dismiss the action.

OSLER, J.A.—In each of these four cases the plaintiff sues as an assignee under the 48 Vict. ch. 26(O.): "An Act respecting assignments for the benefit of creditors," to rescind cer-

tain transactions of the debtor-assignors made in fraud of their creditors generally, either by paying money, or assigning or mortgaging property to individual creditors in violation of the provisions of the Act, and the Acts amending it. (a)

We must take it that the assignee in each case is a sheriff or other person authorized by the creditors, to whom only an assignment may be validly made under the provisions of the Act.

The question involved in the appeal is the constitutional validity of this legislation. It appears in the statute as an excrescence upon the R. S. O. (1877), ch. 118: "An Act respecting the fraudulent preference of creditors by persons in insolvent circumstances," the provisions found in which have been in force since 1858, 22 Vict. ch. 96, secs. 18, 19, and were directed against judgments, warrants of attorney, &c., and gifts and conveyances made by persons in insolvent circumstances with intent to defeat, delay, or prejudice their creditors; in other words against fraudulent preferences, as its title imports; the debtor's common law right to make an assignment for the benefit of his creditors generally being expressly reserved to him.

Under such an assignment the assignee was the representative of the debtor, and became a trustee for the creditors in respect of the property which came to his hands by virtue of the conveyance, and he administered it in accordance with the trust, which to be valid as against execution creditors must, as is well settled, have been substantially merely a trust for the payment of creditors generally, without preference or priority. The position of such an assignee is well stated by Mr. Justice Strong, in the case of *Burland v. Moffatt*, 11 S. C. R. 76:

"In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights of action as the parties making the assignment to him could have enforced."

The decision itself seems to have been disapproved of by the judicial committee of the Privy Council, in the recent

(a) 49 Vict. ch. 25; 50 Vict. ch. 19.



case of *Porteous v. Reynar*, 57 L. T. N. S. 891, 13 App. Cas. 120, apparently because a wrong view had been taken of some Lower Canadian rule of civil procedure, but there is nothing which detracts from the accuracy of the above quotation as a statement of English law as administered here.

With the simple and private arrangement between the debtor and his creditors under such an assignment, the legislature has now interfered, going far beyond the scope of the original Act, which dealt with fraudulent preferences only, and was a mere extension of the 13 Eliz., ch. 5.

We have to consider whether, if at all, it has gone beyond its legitimate province in doing so. The Act in question, with its amendments, is to be regarded as a whole. Its object and scope are to be considered as those of a single scheme or system for dealing with the property of insolvent persons under certain conditions, in the interest of their creditors providing a uniform law applicable alike to all debtors throughout the Province.

We have been invited to travel over a wide field in the examination of the question which appears however to me to be within a comparatively narrow compass.

It is well to note at the outset the language of the British North America Act. Sec. 91, begins by enacting generally that the parliament may make laws *in relation to* all matters not coming within the classes of subjects assigned exclusively to the Provinces, and then, "for greater certainty but not so as to restrict the generality of the foregoing terms," proceeds to declare, first, affirmatively, that "notwithstanding anything in the Act," the exclusive legislative authority of Parliament extends to all matters coming within, *inter alia*, class 21 of the enumerated classes of subjects following, namely, bankruptcy and insolvency; and, second, negatively, any matter coming within that and the other subjects enumerated *is not to be deemed to come within* the class of matters of a local and private nature assigned exclusively to the Provincial Legislatures.

Our inquiry, therefore, must be, to adopt the language of the Judicial Committee in *the Citizens Insurance Co. v.*



*Parsons*, 7 App. Cas. 96, 109: "whether the Act impeached falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces, *for if it does not*, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *primâ facie* falls within one of these classes of subjects that the further questions arise—viz., whether, notwithstanding, this is so, the subject of the Act does not fall within one of the enumerated classes of subjects in sec. 91, and whether the power of the Provincial Legislature is, or is not, thereby overborne."

The only class of subjects of exclusively provincial cognizance within which it has been suggested that this Act can possibly fall, is the very wide and general one, No. 13 of section 92, "property and civil rights in the Province." That is a class with which as has been frequently observed, any law dealing with bankruptcy and insolvency, must necessarily interfere, and therefore a provincial law which invades the latter subject, cannot be maintained merely because it is also legislating upon property and civil rights in the Province. The whole special subject of bankruptcy and insolvency is reserved to the Dominion, and it does not appear that there are any classes of subjects in sec. 92, which can be said to trench upon, and to be as it were taken out of it and assigned as subjects of exclusively provincial legislation.

This Act is a public Act of a general character. It purports to deal with the estates of all insolvent debtors in the Province who make an assignment, in other words, who voluntarily place their estates in liquidation, and prescribes to whom and in what manner they shall make such assignment. It directly affects the rights of all their creditors whether in this or the other provinces, or elsewhere. So far therefore as it controls the rights of extra provincial creditors, it is not confined to dealing with property and civil rights in the province, although that, as I held in *Jones v. Central R. W. Co.*, 46 U. C. R. 230, may not be an objection in the case of creditors under an Act of a purely private or local character.

The plaintiff's contention in favor of the validity of the Act derives no support from the case of *L'Union St. Jacques de Montreal v. Bélisle*, L.R. 6 P. C. 31. The Judicial Committee there had to deal with a special Act which, as relating to a single institution consisting of members who would, *prima facie*, be subject to the control of the Provincial Legislature, was held to be an Act dealing with a matter of a local or private nature in the Province, and as regards its purpose was not an Act relating to bankruptcy or insolvency, but the reverse. The whole judgment seems to me to affirm the view that general legislation dealing with assets on the footing of bankruptcy or insolvency is *ultra vires* provincial authority.

Another argument that was pressed upon us may be noticed, viz., that so long as Parliament had passed no general law dealing with the subject the field was open to the Legislature to supply the want of one as nearly as might be. Pushed to its legitimate conclusion this argument implies that the Legislature of each Province may pass a local bankrupt or insolvent Act; but it is met and answered by the observation of the Privy Council in *Lambe v. Bank of Toronto*, 12 App. Cas. 588, not indeed for the first time made there, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the Provincial Legislatures rests with the Parliament.

We come then to the question, what is to be understood by the words "Bankruptcy and Insolvency," as used in the 91st section of the the B. N. A. Act? I don't think they are interchangeable, or synonymous terms. Insolvency means, in legal language, a general inability to pay debts, and it has been left for parliament to determine whether there shall be a general and uniform law applying throughout the Dominion, or possibly in one or more Provinces only, to persons in that condition, or whether each individual creditor shall be left to the exercise of his common law or equitable remedies against the estate of his debtor. It was strongly urged that the expression "Bankruptcy and

Insolvency," should be interpreted in the light of the legislation which existed at the passage of the Confederation Act in this Province, or in England, and that provincial legislation is not unconstitutional so long as it does not attempt to provide for compulsory liquidation, or the discharge of the insolvent. It was said that *ex vi termini*, as thus understood, legislation on the subject of bankruptcy or insolvency must include provisions affecting the status of the debtor, relieving him from his liabilities, and enabling his present or future acquired property to be taken, in invitum, for payment of his debts. With this contention, I am unable to agree. These are not the only essential features of an insolvent or bankrupt Act. From the creditor's point of view, provisions of primary importance in any law dealing with the condition of insolvency, are those which concern the distribution of the debtor's estate, the prevention of unjust or fraudulent preferences and the equitable adjustment of their own claims. All these are matters which arise out of, or are connected with the debtor's condition of insolvency or general inability to pay his debts, and would, therefore, as forming part of an Act dealing generally and uniformly with that subject throughout the Dominion, or in any particular Province, seem to be as much within the exclusive legislative control of Parliament as any other provisions an insolvent law might contain. I see not why Parliament might not pass just such an Act as that with which we are now dealing, providing for voluntary liquidation only, and refusing the debtor a discharge.

Such an Act would go, as this does, far beyond the mere administration of the assets on the footing of a contract between the debtor and his assignee. Besides providing what acts and contracts should be void against his creditors, which would, no doubt, be quite within the power of the Legislature, it would confer upon the assignee rights not arising out of the contract, such as the right to sue for the rescission of agreements made in fraud of creditors, or the provisions of the Act; to recover back moneys paid to

creditors, and to avoid rights and liens already acquired by them under judgments or executions. It would restrict the manner in which and the persons to whom an assignment might be made, and would provide for the summary removal of the assignee by the creditors, or the Court, and the appointment of another or an additional assignee. As to creditors, preferential claims would be created or declared as *e. g.*, by 48 Vict. ch. 29, sec. 1, (an Act in *pari materia* with ch. 26); the power of voting would be defined and controlled, and the usual compulsory provisions made for the ranking, proof and contestation of their claims, and for their valuation if they happened to be secured claims.

Provisions such as I have indicated, with many others more or less literally transcribed from some expired insolvent Act, are found in the Act now in question, which I cannot but think, having regard as I have said to their scope, object and effect, are *ultra vires* the Provincial Legislature.

If one object of an insolvent Act be to insure uniformity in the distribution of the assets of the insolvent, it is not attained by legislation of this kind, under which, if within the competence of the local legislatures, the assets of the same debtor carrying on business in more than one province may be distributed upon as many different principles or systems as there are provincial Acts dealing with the question. The section with which we are immediately concerned is section 7 of the 48 Vict. ch. 26. I do not think we can treat it as an isolated independent clause. In the connection it is found, and for the purpose it was enacted, it appears to me that it cannot be sustained, and therefore these appeals must be allowed.

*Appeal in Clarkson's case allowed, with costs.*

#### EDGAR V. CENTRAL BANK.

THIS was an appeal from the judgment of Proudfoot, J., pronounced on the 23rd February, 1887, over-ruling with costs, the defendants' demurrer to the plaintiff's statement



of claim in this action; the learned Judge stating that without hearing argument he would follow the decision in *Clarkson v. The Ontario Bank*.

The statement of claim set forth that on the 13th June, 1886, one S. H. Christian, then being insolvent, made an assignment of his estate and effects to the plaintiff under the provisions of the 48 Vict. ch. 26, (O.) which he accepted; prior to which, however, and on the 16th of February, 1886, Christian then being in insolvent circumstances, as the defendants well knew, and with intent to give them a preference, gave them a mortgage upon certain lands in the township of Reach, for the alleged consideration of \$4,400, which was made payable in three months from the date thereof.

It further alleged that the \$4,400 was not then advanced to Christian, nor was any part thereof, but on the contrary the mortgage was executed to secure a prior indebtedness then overdue from Christian to the defendants; and that such mortgage was executed by Christian with intent to defeat, delay, and prejudice his creditors, and to give the defendants a preference over his other creditors; and claimed that the mortgage might be declared fraudulent and void as a preference, and the defendants ordered to pay plaintiff his costs of suit.

The defendants by their statement of defence denied that Christian was insolvent, and insisted by way of demurrer that the Act (48 Vict. ch. 26) was beyond the power and jurisdiction of the legislature of Ontario, and did not confer on plaintiff any right, power, or authority to sue by virtue of the alleged assignment.

*Lefroy*, for the appellants, contended that the Ontario Act (48 Vict. ch. 26) was one passed in relation to bankruptcy and insolvency as to which by sec. 91, sub-sec. 21, of the British North America Act, exclusive legislative authority is vested in the Parliament of Canada.

This Act enacts that gifts, conveyances, assignments, &c., and the legal rights and liabilities arising therefrom shall



be affected and governed by the mere fact of the party making such gifts, &c., being in insolvent circumstances, or on the eve of insolvency, without there being any element of fraud, fraudulent intent in the transaction, or any kind of fraud or mala fides; and further the mere fact of a person being insolvent, and of an assignment being made under the Act by him, it causes such assignment to take precedence of all judgments and executions not completely executed by payment, and regulates and restrains the rights of creditors of such insolvent, and of third parties; in other words, has all the essential requisites of a Bankruptcy Act. *L'Union St. Jacques de Montreal v. Belisle*, L. R. 6 C. P. 31; *Crombie v. Jackson*, 34 U. C. R. 575; *Kinney v. Dunman*, 2 R. & Ches. 19, Cart. S. C. Cas. Vol. 2, p. 412; *Regina v. Chandler*, 1 Hannay 556, Cart. S. C. Cas. Vol. 2, p. 421, were referred to.

*E. F. B. Johnston*, for the Attorney-General of Ontario. In *Regina v. Chandler*, cited for the appellants, the principal, if not the only question discussed was whether the local legislature had the power of discharging an insolvent. And in *Cushing v. Dupuy*, 5 App. Cas. 409, the question was how far that body could interfere with an officer appointed by the Dominion Government. Neither of these cases bears upon the question raised on this appeal.

It is the act of the creditors that was there in question. Here, under our statute, the creditor can take no effective step without the concurrence of the debtor. If this be so, then this Legislature cannot interfere or deal with priorities of executions. The principles governing the distribution of property under attachment are within the competency of the local legislature. There is no difference between such a case and the present: *Ebersale v. Adams*, 10 Bush. 83; *Linthicum v. Fenley*, 11 Bush. 131; *Blanchard v. Russell*, 13 Mass. 112.

The Province, apart from the British North America Act, would have the power inherently to deal with property as it is dealt with by the Act in question. The British North America Act does not destroy such right, but suspends it

only. The restriction as against the provinces is merely the result of a political arrangement whereby the provinces are united in a Federal Government without their rights being abrogated.

If the Dominion Government therefore does not exercise its rights as regards bankruptcy, the power to deal with that law may be exercised by the Local Legislature. The reason is, that if the Dominion practically waives its right to legislate on that branch of property and civil rights, which was excepted in its favor, the Local Government would have the power under the wide term, and because that power only remained in suspense during the exercise of Dominion rights; and this agrees with the rule in the United States where each state has the right to legislate on subjects within the competency of the Federal Government where that Government does not make the necessary provision as required by the constitution: *Sturgis v. Crown-inshields*, 4 Wheat. 122. He also referred to and commented on *Cook v. Rogers*, 31 Mich. 391; *Mayer v. Hellman*, 91 U. S. R. 496; *Maltbie, v. Hothkiss*, 3 Conn. 80; *Simpson v. The Savings Bank*, 56 N. H. 466; and to *L'Union St. Jacques de Montreal v. Bélisle*, *supra*, in which case some of the Lords of the Privy Council intimated an opinion that in such a state of facts the Provincial Legislature would have the right to act.

*J. H. McDonald*, Q. C., for the respondents.

BURTON, J.A.—The sole question before us on this appeal is, as to the power of the Local Legislature to pass the Act 48 Vic. ch. 26, giving power to the assignee under an assignment made in the form prescribed by that Act, to impeach a transaction alleged to have been made with intent to defeat or delay creditors.

Whether it is beyond the jurisdiction of the Local Legislature to pass the Act must depend upon whether the matter dealt with by the Act comes within the class of subjects which by the 91st section of the British North America Act are reserved exclusively for legislation by the Dominion Parliament.

Among these are bankruptcy and insolvency, by which, as I understand it, that parliament has the exclusive right to define the classes of persons who may be declared liable to be adjudicated bankrupt or insolvent, the acts, defaults or omissions which shall be sufficient to warrant such an adjudication, the mode of adjudication, the vesting their estates in an officer of their creation, and to prescribe the manner in which the estates of such persons shall be administered, with a view to equality of distribution, and the transactions which as against the officer so appointed shall be declared void.

Bankruptcy has to do chiefly with the vesting and equal distribution of the estates of such persons as have voluntarily or involuntarily been declared bankrupt by a court of competent jurisdiction, whilst insolvent laws have generally to deal with the discharge from arrest or custody of such persons as under the terms prescribed by law make a general cession of all their property for the benefit of their creditors.

If the Act in question comes within the description of a Bankrupt or Insolvent Act, as thus defined, it would be in excess of the powers of the Local Legislature.

The preamble to the Act professes to deal not with persons who have been declared bankrupt or insolvent according to law, for at the time of its passing, and at the time of the passage of the Act which it purports to amend there was no bankrupt or insolvent Act in force in the Province, but is meant to apply to persons in impecunious circumstances, and unable to meet their engagements.

The original Act was passed as long ago as 1858 to remedy, to a partial extent, the evils resulting from the absence of a bankrupt law which had shortly before been allowed to expire.

That Act is to be found in the Revised Statutes of Ontario (1877), as ch. 118, and is entitled "An Act respecting the fraudulent preference of creditors by persons in insolvent circumstances," and was amended by 47 Vict. ch. 10, sec. 3.

The preamble to the Act now under consideration recites that great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, and that it is desirable to remedy the same, and then proceeds to repeal the clause of the original Act as so amended, and re-enacts it with a variation which, it is urged, was intended to avoid any of the transfers to which it refers, not only if made by the debtor with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, *but also if it had such effect.*

The only material alteration from the section as it stood originally, consists in the few words which are italicised, and the extension of its operation to real as well as personal property.

So far it partakes no more of the character of a bankruptcy Act than did the 13th Eliz. ch. 5, and would be clearly within the competency of the local legislature to enact.

Then comes sec. 3, which in more general terms was to be found in the former section as a proviso.

Its effect is to declare that the previous section shall not apply to any assignment made to the sheriff of the county, or to any other assignee with the assent of the creditors as thereafter provided, for the purpose of paying ratably and proportionately, and without preference or priority all the creditors their just debts.

The former enactment excepted from the operation of the statute a general assignment for the equal benefit of creditors if made to any one. The present Act restricts the exception to cases in which the assignment is made to a named official, or to some other person with the assent of the creditors.

There is nothing compulsory upon the debtor. The only effect of his making a general assignment otherwise than the Act provides is, that the transfer is possibly liable, though not so in my opinion, to be avoided by a non-assenting creditor under the previous section.



That is a matter which the Provincial Legislature having exclusive power to deal with property and civil rights have clear authority to enact. Apart from the statute the debtor had always the power of making an assignment for the general benefit of his creditors, and it may be doubtful whether the provision in the former enactment was not inserted *ex abundanti cautela*. The hindrance and delay to particular creditors in their efforts to reach, before others, the property of a debtor, which may follow a general assignment for the benefit of creditors *pari passu*, have always been regarded as unavoidable incidents to a just and lawful act which no way impair the validity of the transfer. And an enactment which expressly excepts from the operation of the previous section certain of such assignments only, is not open to objection as being part of a bankrupt or insolvent law.

The Act now before us does not compel an assignment in a particular form, but provides that if executed in a particular manner it shall have a certain effect. Many of the sections relate to mere matters of regulation and management which might properly be the subject of express provision in an ordinary deed of arrangement or assignment for the benefit of creditors and others, which, though open to objection in such a deed as amounting to a dictation by the debtor, are fair and equitable in themselves, and such as the assignee in an ordinary case, or under the direction of a majority of the creditors would presumably adopt; others again are of a more arbitrary character which a majority of creditors could not enforce against the minority; such, for instance, as a scale of votes for the decision of all questions arising in administering the estate under such an assignment as is authorised by the Act; but it is impossible to say that that was not within the power of the Local Legislature.

I shall deal therefore only with those sections which are not altogether of that character, and which are applicable to this and the other cases now standing for judgment.

Some of them, such as section 6, have an alarming simi-



larity to provisions to be found in our former insolvency law, but I can see no reason for holding that section invalid. The powers to be exercised by the judge are not dissimilar to those which in the case of ordinary trust deeds have, without express legislative authority, been exercised from time immemorial by the Judges of the Court of Chancery.

I have, in another of these cases, considered the operation of section 7, and the rights of the assignee under it, but whatever may be the extent of those rights, I see no reason whatever for the contention that it was not within the power of a Provincial Legislature to pass the section; it is quite possible that it may be very imperfect legislation, as is very apt to be the case with any legislation which attempts to secure the equal distribution of the estates of insolvent persons otherwise than by a well considered bankruptcy law under which the rights of all parties may be equitably and fairly dealt with.

If the Parliament of the Dominion were to pass a bankrupt law, they would, I entertain no doubt, declare that any assignment for the benefit of creditors made otherwise than in the manner prescribed by that Act, should be an act of bankruptcy, and void.

This case does not call for any expression of opinion as to section 9, which gives an effect to the assignment which savors more of bankruptcy legislation than any to which I have as yet referred, but I prefer reserving my opinion until some case arises which renders it necessary to place a construction upon it.

It would perhaps have been wiser if the framers of the Confederation Act had provided that in the event of the Dominion neglecting to pass a bankruptcy Act, the Legislatures of the several provinces should have the power as is the case in the several States in the Union where Congress omits to pass a general bankrupt law.

The want of a bankrupt law in the old Province of Canada, and the strong pressure of public opinion among English merchants dealing with Canada, led to the mongrel legislation of 1858, of which this Act is an amendment, and

no doubt great difficulty was experienced by the framers of the amendment so to word it as to secure as nearly as possible to creditors the benefits of a bankrupt law without exceeding their jurisdiction. In doing so they have in one or two instances adopted provisions of the old bankrupt or insolvent law in force here without striking out some words which are quite inapplicable to the present enactment; for instance, sections 7 and 11 introduce the word "inspectors," officers who had duties to perform under the old Insolvent Act, but whose duties are not defined, and for whose appointment no provision is made in the present Act.

But notwithstanding the similarity of the language used in these sections to that to be found in the Insolvent Act, I am of opinion that there is nothing in the statute to bring it within the class of subjects referred to as bankruptcy and insolvency under section 91.

It does not compel an assignment from the debtor, but simply declares that if made in a particular manner the transfer shall not be liable to be defeated under the previous section. It does not discharge or relieve the debtor from arrest or imprisonment, and it leaves his after-acquired property to be dealt with precisely as if no such assignment had been made.

The appointment of new trustees, and the enforcing of the trusts, are not different in principle from the same powers which the courts have been in the habit of exercising for years in the case of ordinary trust deeds.

Mr. Lefroy cited a case decided in the Courts of New Brunswick, which I am obliged to admit is contrary to the views I have expressed, and which, if good law, would extend the words bankruptcy and insolvency much farther than I am prepared to admit that they do extend. I refer to *Regina v. Chandler*, supra, but it must be borne in mind that that case was decided very shortly after the passing of the British North America Act, and before its meaning and construction had received the full discussion which they have since that time been subjected to; and I doubt whether

the learned Judge who delivered that judgment would still adhere to it. For the reasons which I have given, I cannot at all events agree in that decision.

When we are called upon to decide a question of the validity of an enactment under the Confederation Act, we should, I think, always lean to that construction which will sustain the enactment as being *intra vires*, rather than to one which would avoid it, and we ought not to presume except upon the most cogent grounds that the legislature has exceeded its powers.

It by no means follows that because the Dominion has the exclusive power to make laws having for their object the establishment of one uniform system of bankruptcy throughout the Dominion, that in the absence of such laws the Provinces are debarred from securing as far as possible an equal distribution of the assets of debtors who cannot pay their creditors in full.

There are many cases which may arise under the Act in which it would be found almost impossible to work out the scheme of federation if the words of the Act were to be read literally without any restriction or qualification whatever. Take, for example, the subject of interest, which is one of the subjects for obvious reasons reserved to the Dominion Parliament, with a view to secure uniformity. Yet it would scarcely be contended that a local legislature could not, as the Ontario Legislature has done, enact that a verdict recovered for any cause of action shall bear interest, and the rate of that interest, provided it did not exceed the rate fixed by the Dominion Parliament.

I think the learned Judge below was right in his conclusion, and that the appeal should be dismissed.

PATTERSON, J. A.—The questions in this appeal arise on demurrer to the plaintiff's statement of claim.

The allegations are that prior to the 13th of June, 1886, one Christian carried on business as a general merchant at a town in the Province of Ontario: that on or about the said date, Christian then being insolvent, made

an assignment of his estate and effects to the plaintiff under the provisions of the Ontario Act 48 Vict. ch. 26, and the plaintiff accepted the assignment and is now trustee of the estate; that on the 16th of February, 1886, which was before the assignment, Christian then being in insolvent circumstances, as the defendants well knew, and with intent to give the defendants a preference, gave to the defendants a mortgage upon land for the alleged consideration of \$4,400, payable in three months from the date of the mortgage; that the \$4,400 was not, nor was any part of it, then advanced to Christian, but he made the mortgage to secure a prior indebtedness to the defendants; and that at the time of the execution of the mortgage, Christian was in insolvent circumstances and unable to pay his debts in full, and the mortgage was executed by him with intent to defeat, delay, and prejudice his creditors, and with the intent to give the defendants a preference over his other creditors, and had the effect of giving such preference.

And the plaintiff asks the Court to declare the mortgage to be fraudulent and void as a preference.

The statute 48 Vict. ch. 26, was passed on the 30th of March, 1885, but was not in force until the first of September, 1885. It was amended by 49 Vict. ch. 25, passed on the 25th of March, 1886, and by 50 Vict. ch. 19, passed on the 23rd of April, 1887, which brought the Act into the form in which it now appears in ch. 124 of the R. S. O. 1887.

The last amendment was after the commencement of this action. The assignment to the plaintiff was of later date than the first amendment, and the mortgage which he attacks was made before the first amendment of the Act. I do not think anything would turn on the amendments, even if they had been in force at the time of the transactions, and it may therefore be sufficient to refer, as the plaintiff has done in his statement, only to the original Act.

The defendants demur to the claim on the ground that the provisions of the Act are beyond the legislative juris-



diction of the province in so far as they affect to provide for the appointment of assignees, and the vesting in them of all rights to sue for the rescission of agreements, deeds, and instruments or other transactions, and that all other provisions of the Act with reference to the alleged powers, rights, and authorities of assignees, in respect to the estates, rights, and credits of debtors, are also *ultra vires*.

The demurrer was overruled, and the defendants appeal to this Court.

The general ground of objection to the statute is that it is legislation concerning bankruptcy and insolvency, which are subjects assigned by the British North America Act to the exclusive legislative jurisdiction of the Dominion Parliament.

There are two branches of the legislation covered by the same provincial statute, but not necessarily connected with each other; one voiding certain transactions as against creditors; and the other dealing with assignments for the benefit of creditors. They are both impeached by the defendants as being *ultra vires*, as legislation on the forbidden subject of bankruptcy and insolvency.

The first branch is composed of the second and third sections of the Act.

Section 2 enacts that every gift, conveyance, assignment, transfer, delivery over, or payment of any goods, chattels, or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one of them, or which has such effect, shall, as against them, be utterly void.

This section merely repeats, with the language rearranged and with a little expansion, a provision which was introduced into the statute law of the Province of Canada in 1858, as part of the Act for the Abolition of Im-



prisonment for Debt, 22 Vict. ch. 90, sec. 19, after which it formed sec. 18 of C. S. U. C. ch. 26, and sec. 2 of R. S. O. ch. 118.

The only addition material to notice at present, is the phrase "real or personal," without which the Act would not have applied to the mortgage now in question, because the former Acts did not apply to real estate. Another addition, important in itself but not directly affecting the present inquiry, is the introduction of the words "or which has such effect."

The original section had a proviso saving sales of goods made in the ordinary course of business to innocent purchasers, and deeds of assignment made for the purpose of paying creditors ratably and proportionably and without preference or priority. These and other exceptions from the operation of section 2 are the subjects of the present section 3. They do not affect this mortgage transaction, and it will be as well to leave them out of sight while we consider whether, in enacting section 2, the Legislature trespassed on the domain of the Parliament.

The difference between the section and 13 Eliz. ch. 5 is mainly in the two respects; the express restriction of the law to persons who cannot pay all their debts; and the extension to preferences as among the creditors.

The principle dates with us, as I have said, from 1858, and was originally associated with the relief given to the debtor by doing away with the common law process under which his body was taken in execution.

The Act of 1858 applied only to Upper Canada. Its governing idea seems to have been the ratable distribution of the assets among the creditors when they were insufficient to pay every one. The saving of general assignments for the benefit of creditors from the operation of section 19, while perhaps introduced *ex majore cautela* rather than from necessity, serves to make it manifest that the idea of ratable distribution was in the mind of the legislature. In Lower Canada it was already a part of the ordinary procedure to distribute the assets of a debtor

among his creditors when an execution issued on a judgment for a debt.

The measure of 1858 was, however, imperfect. Intended though it was to discourage or do away with the preference of one creditor over another, which had been decided in *Holbird v. Anderson*, 5 T. R. 235, not to be within the mischief of the Statute of Elizabeth, it yet provided no machinery for giving practical effect to the idea of ratable distribution, but left the debtor's effects to be taken by executions in the order of their priority.

A creditor could not retain as against another who had an execution an asset transferred to him as a preferential payment of his debt, but the execution creditor took it. The preference was not averted, but was transferred from one creditor to another.

We may regard the second section of the Act of 1885 as new legislation, but it does not vary from or extend the principle of the 19th section of the Act of 1858. It differs only in some details.

The argument before us was directed principally, if not altogether, to the other branch, or the procedure branch, of the Act of 1885; but this second section is expressly impeached in the formal reasons given for the appeal in this case of *Edgar v. The Central Bank*. One of the reasons is thus expressed:

"2. The said Act is a Bankruptcy or Insolvent Act, because it enacts that gifts, conveyances, assignments, and transfers of property, real or personal, and the legal rights and liabilities and relations arising therefrom shall be affected and qualified by the mere isolated fact of the party making such gifts, conveyances, assignments, and transfers being in insolvent circumstances, or on the eve of insolvency, without there being any element of fraudulent intent in the transaction, or any kind of fraud or mala fides.

It is true, as I have already remarked, that this part of the Act deals only with persons who are in insolvent circumstances. It is only for such persons that the rule against preferential transactions is required. The Statute of 13 Eliz. is wide enough to reach all others, particularly

as explained by our Act R. S. O. ch. 95, sec. 3, and it may be remarked, in the language of Lord Tenterden, that "there is undoubtedly high authority for saying that a party must be in insolvent circumstances to render a conveyance by him fraudulent within the statute of Elizabeth." *Shears v. Rogers*, 3 B. & Ad. 362, at 369.

The argument against the power of the provincial legislature to impose restrictions upon the disposition of his property by a person who is unable to pay his debts in full, or using the equivalent expression, who is insolvent, rests on what I take to be an inadequate view of the scope and scheme of the British North America Act.

The powers of the Parliament under section 91 of the Act, to make laws for the peace, order, and good government of Canada, include, among the specified classes of subjects, Bankruptcy and Insolvency, the object obviously being, that upon that branch of the law, as well as on other enumerated subjects connected more or less intimately with the comprehensive head of the Regulation of Trade and Commerce, the same general law shall prevail throughout the Dominion.

The legislative jurisdiction over property and civil rights in the Province which, under section 92, belongs to the Local Legislature, is necessarily qualified by the inevitable interference with such rights in the exercise of the powers of the Parliament.

A bankrupt or insolvent Act will of necessity include many such interferences, and may, with propriety, make provisions of the kind, for the better carrying out of the systems which may yet not be of the essence of a bankrupt or insolvent law. Take for example the English Bankrupt Acts of 1849, 1861, 1869, and 1883. Each was in itself a complete bankrupt Act, and there was a complete system in force before any one of them was passed; yet new and important features were introduced into the law by each of the Acts.

In like manner the Dominion Parliament may frame its own system and assert exclusive jurisdiction to abridge or

extend or otherwise interfere with civil rights, in respect of property or person, in carrying out its system. Legislation of that character will override any provincial legislation on the same subjects. Amongst other things, a bankrupt Act might well contain provisions on the same subject, and covering the same ground as this section 2. That was the case with our provincial Insolvent Act of 1864, and the Dominion Insolvent Acts of 1869 and 1875, which were all bankrupt Acts. While they were in force the provisions we are discussing were practically in abeyance. The law remained on the statute book, but its occupation was gone. At least I cannot remember any instance in which it was resorted to, even during the time of the Act of 1875 which applied only to traders.

There is now no Dominion legislation with which it can come into conflict. It deals with a subject which might not improperly, and would most likely, be dealt with by a bankrupt law, if the Parliament should think fit to pass one; but, for all that, it is not in my judgment legislation on bankruptcy or insolvency. It encourages, while it does not assume to compel, debtors who are insolvent to place all their creditors on equal footing, and, in the second branch of the statute, which I am about to discuss, gives legislative aid in carrying out that honest purpose.

Some passages in the judgment in *Pickstock v. Lyster*, 3 M. & S. 371, may be found instructive in connection with this discussion, though they were addressed to the statute of 13 Elizabeth.

"Can any one doubt," said Lord Ellenborough, "that the first motive in many of those cases, as well as in this, was to defeat the particular creditor? But at the same time it is not considered any injury to him, being for the benefit of all the creditors to procure an equal distribution amongst all of that fund to which all have an equal right, against one who has gained the first step upon them. \* \* Such an assignment as the present is to be referred to an act of duty rather than of fraud, where no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. \* \* It



is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit."

LeBlanc, J., said, that "to hold such a deed fraudulent would be contrary, not only to *Holbird v. Anderson*, but to all the cases that have decided that a party, independent of the bankrupt statutes, may convey away his property for the benefit of all his creditors."

This is some authority, if authority were necessary, for distinguishing between the voluntary assignment in question and a proceeding in bankruptcy, notwithstanding that a system of bankruptcy procedure would properly include the subject of such assignments. To hold this second section ultra vires, as being legislation on bankruptcy or insolvency, would, in my judgment, be an incorrect interpretation of the principle of the British North America Act, and at variance with what I understand to be the tenor of the decisions upon the Act by the Judicial Committee of the Privy Council, from *L'Union St. Jacques de Montreal v. Bélisle*, L. R. 5 P. C. 31, through the whole series down to *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

I pass now to the other or the procedure branch of the statute.

A point is made in the formal reasons of appeal on the assumption that this branch deals, like section 2, only with the case of persons in insolvent circumstances. In practical operation it may only touch such cases, but there is nothing in the statute itself to confine it to them.

Section 3 begins thus :

"Nothing in the preceding section shall apply to any assignments made to the sheriff of the county in which the debtor resides or carries on his business, or to another assignee with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately, and without preference or priority, all the creditors of the debtor their just debts;" and then a variety of other transactions are also excepted, which we need not now stop to notice.



The fourth subsection of section 3 enacted that "the debtor may in the first place, with the consent of a majority of his creditors having claims of \$100 and upwards, computed according to the provisions of section 18, make a general assignment for the benefit of his creditors to some other person than the sheriff."

The provision of section 18 is that, subject to the provisions of section 6, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows : giving a scale according to amounts of debts, from \$100 upwards.

An assignment to the sheriff, or to an assignee so appointed, is spoken of as "made under the Act," though the permission to make it is rather implied than directly given.

Section 4 declares that every assignment made under this Act for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say :

"All my personal property which may be seized and sold under execution, and all my real estate, credits, and effects, or if it is in words to the like effect ; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment."

In this we have a short form of assignment, analogous to the short form of conveyance in R. S. O. ch. 102 which follows the English Act 8 & 9 Viet. ch. 119, to which effect is given when the assignee is the sheriff, or a person selected by the creditors, the assignment in either case being voluntary on the part of the debtor.

I take no notice of provisions made by the Act of 1887 for the case of assignments to other persons. The Act of 1885 simply leaves them untouched, except so far as they

are not withdrawn from the operation of section 2. Such assignments were in terms excepted in the proviso to the section in its original shape, but that may have been, as I have said, *ex majore cautela*, because an assignment for the the general benefit of creditors, free from imputation of fraud or preferential design or effect, could not be within the mischief of the enactment.

The rest of the statute is apparently framed, in many respects, after certain provisions of our Insolvent Acts of 1864, &c., and those provisions are undoubtedly appropriate to a bankrupt law. It may safely be asserted that a bankrupt law, or a law for the winding-up of estates, would be incomplete without something answering to them. The question is whether their presence here constitutes this legislation an encroachment on the exclusive territory of the parliament by crossing the line that divides bankruptcy and insolvency, or what is expressed by those terms in section 91, from the general subject of property and civil rights with which, by section 92, the Legislature is permitted to deal.

The matters dealt with by the statute come clearly within the definition of property and civil rights in the Province, and are, therefore, *prima facie* within the local jurisdiction. It is only reasonable that those who impugn the jurisdiction should be held to the onus of displacing it.

We have, as a starting point from which to commence the examination of this second branch of the statute, an assignment voluntarily made by a debtor in discharge of the moral duty dwelt upon by Lord Ellenborough, in order that all his creditors may share equally in what he has, no one being preferred to another.

The assignment dealt with by the Act of 1885 is one made to the sheriff or to another trustee selected by the creditors.

Section 5 provides that, in the distribution of the trust estate, partnership property shall be applied first in payment of partnership debts, and separate property in payment of separate debts.

This merely applies to the administration of the trust a well established rule of equity, and authorizes a principle of distribution which, as held in *Badenach v. Slater*, 8 A. R. 402 ; 10 S. C. R. 296, is not otherwise than ratable and proportionate, and is not open to the imputation of giving preference or priority as among the creditors.

Section 6 provides for the substitution by the creditors of an assignee of their own selection for the sheriff, and for the removal and appointment of assignees by the Court, the estate vesting (by an amendment made in 1886) in the new assignee.

This is merely a recognition of the creditors as the beneficial owners of the estate assigned for their benefit, and of the assignee as a trustee subject to the ordinary jurisdiction of the Court.

The next section goes somewhat farther, and inasmuch as the plaintiff depends upon it for his power to maintain this action, it demands careful consideration.

It gives the assignee the exclusive right (save in one specified case) of suing for the rescission of agreements, deeds and instruments, or other transactions, made or entered into in fraud of creditors, or made or entered into in violation of the Act respecting the fraudulent preference of creditors by persons in insolvent circumstances, (which is R. S. O. ch. 118), or of this Act.

A creditor could always sue for the rescission of a transaction which was fraudulent as against him, or was declared by statute to be void as against creditors. It does not matter whether, as under the former jurisdiction of the Courts, he appealed to the auxiliary jurisdiction of a Court of equity after having first established his claim at law ; or whether under the present system he asked in the one action for process for the recovery of his debt and for the removal of the fraudulent or voidable conveyance ; or, before his own debt may have become payable, asked on behalf of all the creditors, a declaration of the invalidity of the transaction. In one way or another he had a remedy. See *Longeway v. Mitchell*, 17 Gr. 190 ; *Parkes v. St. George*,

10 A. R. 496; *McDonald v. McCall*, 12 A. R. 593, for full discussion of the subject.

That remedy is now, by sec. 7, transferred from the creditors to the assignee. This seems at first sight to be an advance upon the direct effect of the assignment.

There never was any question, in this Province, of the right of a trustee in whom the trust estate was vested to maintain or defend actions relating to the estate, such as was recently before the Judicial Committee in *Porteous v. Reynar*, 57 L. T. N. S. 891, 13 App. Cas. 120, on an appeal from the Province of Quebec; but an assignment such as that now in discussion being made by a person who had already conveyed, and who could not revoke his own deed, would not *primâ facie* be taken to vest the property, in any sense, in the subsequent assignee.

That was the opinion of all the members of this Court, I believe, in *Macdonald v. McCall*. The property which, in that case, had been the subject of a preferential mortgage had, for convenience sake, been sold, and the money paid into Court. An order of the High Court that that money should be paid out to the assignee under an assignment for the benefit of creditors, to be distributed by him under the trusts of the assignment, seemed to us in this Court to give too wide an effect to the assignment. But the Supreme Court restored the order, apparently recognising in the assignee a title similar to that recognised, if not newly conferred, by section 7.

The right of the Local Legislature to confer the power in question upon the assignee, or to give it to him to the exclusion of the creditors, seems to me to follow as a necessary complement of the right to declare a preferential assignment of goods or land void against creditors, though binding between the parties to it.

Some machinery was wanted to give practical effect to the mandate against preferences of particular creditors, and this section 7 supplies it not for all cases, but for use in the case of a voluntary assignment made by the debtor for the general benefit of all his creditors.



Even if, on strict reasoning, it ought to be held, as we held in *Macdonald v. McCall*, that the asset had ceased to be within the disposing power of the debtor before he made the assignment for the benefit of his creditors—a position which, since the ultimate decision in that case, may not be unquestionable—yet as soon as the assignee is recognised as representing the creditors, there ceases to be any serious logical impropriety in holding that assets which, notwithstanding a preferential transfer, remained exigible for the debts of the transferor, passed with the other assets of the debtor to the assignee.

A bill of sale which does not fulfill the requirements of the English Bills of Sale Act, 1878, is by the eighth section of that Act declared fraudulent and void against trustees or assignees under an assignment for the benefit of creditors, as well as against trustees under the law relating to bankruptcy or liquidation, and against executions.

That is legislation of essentially the same character as our section 7, notwithstanding that our section does not give the assignee any new rights in respect of instruments which are declared void against creditors by our Chattel Mortgages Act, R. S. O. ch. 119. It is essentially the same in its recognition of the assignee as representing the creditors, and as taking, in his character of assignee, property which his assignor had already conveyed to another; and it is opposed to the assumption that such a provision, enacted in aid of the administration of an estate assigned for the benefit of creditors, is necessarily or primarily a dealing with the subject of bankruptcy.

If we read our statute very critically we shall not find express words vesting in the assignee, or declaring that the assignment shall be deemed to convey, property which has been disposed of by a transaction void or voidable under section 2; nor do we find any such express provision in the English Bills of Sale Act. The power given in terms by section 7 to sue for the rescission of deeds, &c., is, however, equivalent to a declaration that they are void as against the assignee; and although it is not said where the pro-



perty is to go when the transaction is rescinded, the meaning must be that the assignee takes it for distribution under the trusts of the assignment. That is the purpose of the Act.

We may adopt the language of Kindersley, V.C., in *Hue v. French*, 3 Jur. N. S. 428, where he said :

“ The manner in which Courts of Equity have construed that statute [13 Eliz.] is, that the instrument by which a debtor makes a voluntary assignment of his property, assuming it to be fraudulent as against creditors, is to be regarded as if it had never existed ; ” and therefore treat the property as passing under the deed.

Section 8 bears out this view of the Act. It provides that where property taken in a transaction voidable under section 2 shall have been sold, the proceeds may be seized or recovered in any actions under section 7, as fully and effectually as the property, if still remaining in the possession or control of the transferee, could have been seized or recovered.

The actions under section 7 are the action by the assignee, and an action which may be brought by a creditor in case the assignee, under the authority of the creditors or inspectors, declines to sue. The seizure or recovery spoken of are obviously a seizure or recovery by the assignee or the suing creditor as the case may be.

I hold for these reasons that the effect of section 7 is to vest in the assignee the disputed asset ; and that the enactment which causes it so to vest, and which gives him an action on behalf of the creditors, his cestui que trustent, to avoid transactions declared by section 2 to be void against creditors is not legislation on the subject of bankruptcy or insolvency, as intended by section 91 of the B. N. A. Act.

It, in fact, only places the assignee in the relation to the estate and to the creditors which Lord Tenterden, in *Shears v. Rogers*, 3 B. & Ad. 362, 369, explained as being that of the executor of a deceased debtor.

“ The authorities shew,” he said, “ that whenever a man makes a gift of goods which is fraudulent and void as

against creditors, and dies, he is considered to have died in full possession, with respect to the claim of the creditors, and the goods are assets in the hands of the executor."

There is nothing in the present appeal to require me to go beyond this point, and I have no desire to transgress the wholesome rule laid down by his lordship the Chief Justice, and adopted by the Judicial Committee, in *Hodge's* case, 9 App. Cas. 117,128.

"That in all these questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision."

I may say, however, that the remainder of the Act, excepting, perhaps, the ninth section, seems to be so entirely occupied with matters of mere procedure as to call for no remark beyond those already made.

The ninth section enacts that an assignment for the general benefit of creditors, under this Act, shall take precedence of all judgments, and of all executions not completely executed by payment.

This strikes me as being a very peculiar enactment. It certainly conveys the impression of providing for something beyond the scope of a voluntary assignment by a debtor, and it thus introduces a new consideration into the ultra vires discussion. But, when I read the clause attentively, I find it hard to say what it means, or that it has any meaning to which a Court could give practical effect.

It seems to present more questions than there are lines in the printed clause.

It cannot, however, affect in any way the claim of this plaintiff against these defendants, and it will be the safer course to reserve the discussion of it until it comes more directly in question.

My opinion of this appeal is that it should be dismissed.

The Court being equally divided, the appeal was dismissed, with costs.

#### KENNEDY V. FREEMAN.

THIS was an appeal by the defendants from the judgment of James Shaw Sinclair, Esq., Judge of the County Court of Wentworth, delivered on the 24th January, 1887, sitting in the place and at the request of Rose, J.

The statement of claim set forth that the plaintiff was the assignee for the benefit of the creditors of the estate and effects of Francis Nicolls, by virtue of an assignment dated 7th June, 1886, duly executed in pursuance of ch. 26, 48 Vict.

That on the 16th of November, 1885, Nicolls was in insolvent circumstances, and unable to pay his debts in full within the meaning of section 2 of said Act ; on which day he was indebted to the defendant Freeman in respect of an overdue account for goods which had been supplied by him some time before that date, and on that day Nicolls, being in insolvent circumstances, or unable to pay his debts in full, as aforesaid, and knowing that he was on the eve of insolvency, and with intent to give Freeman a preference over his other creditors, executed to him a chattel mortgage upon his engine and boiler, seven horses, and other goods therein described, for the amount of the account then past due to Freeman, and Freeman did not by reason or on account of the giving of that security make an advance in money to Nicolls in the bonâ fide belief that the advance would enable him to continue his business and to pay his debts in full, nor did he, in fact, make him any advance ; and that such chattel mortgage was given with intent to defeat and delay the other creditors of Nicolls ; and prayed that such security might be declared void and for further and other relief.

The statement of defence denied all fraud or fraudulent intent in obtaining the chattel mortgage, or that Nicolls was insolvent, &c., when he executed the same ; or that he intended to defeat or delay his creditors, or give defendant a preference over his other creditors, and set up also that the statute under which plaintiff was appointed assignee was ultra vires the legislature of Ontario.

After taking time to look into the authorities. his Honor gave judgment, observing :

“The contention of the plaintiff was that the chattel mortgage operated as a fraudulent preference under the 118th ch. of the Revised Statutes of Ontario, as amended by 48 Vict. ch. 26, secs. 1 and 2. The plaintiff's right of action was founded on a general statutory assignment made by

the debtor Nicolls to him, and the 7th and 8th secs. of the Act just cited. No question was raised on his right to bring the action, or to impugn the validity of the security impeached.

The question which I have to decide broadly is, whether the chattel mortgage in question can, upon the evidence and law, be upheld as against this plaintiff. I have arrived, in regard to that, at the following conclusions :

1. I am of opinion that at the time of the making the chattel mortgage in question the mortgagor, Nicolls, was in insolvent circumstances, and was then unable to pay his debts in full.

2. I am further of opinion and find that he was well aware of that at the time he made said mortgage.

3. I also find that the defendant and his solicitor had the best and strongest of reasons for believing that Nicolls was in insolvent circumstances and unable to pay his debts in full when he made the chattel mortgage in question ; and if he did not know of such, his state of affairs, it was because he did not choose to inquire into his affairs, which, if he had done, he would unquestionably have discovered the complete insolvency of his mortgagor. After an anxious consideration of the evidence since the trial, I can only say that the evidence of the defendant and his solicitor upon this point is only reconcilable with the absence of knowledge of Nicolls' insolvent circumstances by the remark once made by an English Judge, that "none are so blind as those who do not want to see." Every circumstance that should reasonably have pointed to the true state of the mortgagor's affairs appear to have been ignored by the defendant on taking the mortgage. The knowledge of the solicitor would, I think, in such a case be considered the knowledge of the mortgagee.

4. I find that the mortgage was given and taken with intent to give the mortgagee a preference over the other creditors of the mortgagor.

5. I also find that said mortgage having, as aforesaid, been made by the mortgagor, at a time when he was in insolvent circumstances and unable to pay his debts in full, had the effect of giving the mortgagee therein named a preference over the other creditors of Nicolls. The mortgage being within the operation of the statutes referred to, I have now to determine upon the above findings, the rights of the parties to this litigation. \* \* \* The plaintiff is, in my opinion entitled to judgment for \* \* \* and interest, together with full costs of suit.

The other facts sufficiently appear in the present judgments.

*S. H. Blake*, Q. C., and *Carscallen* (Hamilton), for the appellants.

*Osler*, Q. C. and *H. S. Osler*, for respondent.

BURTON, J.A.—The ultra vires question has been disposed of in *Edgar v. Central Bank*, but in the view I take of the validity of the statute it becomes necessary to consider the



effect of its provisions as applicable to the facts of this case.

I have read the evidence over carefully, and must admit that it does not impress me as it appears to have impressed the learned judge at the trial, and that I could not have held this transaction and a similar one between the insolvent and Myles void under ch. 118, R. S. O.

The main facts appear to be these.

On the 16th November, 1885, Myles had an execution against the alleged insolvent Francis Nicolls. He and the other defendant, Freeman, had been in the habit of supplying him with goods in the way of his trade, which was that of selling coal and wood by retail.

He was then owing Myles about \$765, and Freeman \$488.

Myles put the sheriff in possession, and Nicolls then made an appeal to him to withdraw so that he might use his horses upon a contract he had for block paving some of the streets. Myles's account of what took place is this :

A. "I said 'I don't want to sell you out if you can make me secure so that I can get my money.' I asked him to give me a statement of his assets and liabilities, and I just took it down on one of our accounts.

Q. Is this the memo. produced? A. Yes; I just took down a memo.; took the number of horses he had, his valuation with it, and double wag-gons and harness.

Q. That is in your hand-writing, taken down from his dictation? A. Yes.

Q. 'Only owes one note twelve months to run for \$200, one pair horses.' Was that his statement to you that that was the only debt? A. That was made in our office; at the time when I got that I said we had better come down to Mr. Curell, and we telephoned for Freeman to come up and see him.

Q. Why did you want to see Freeman? A. Because we both went up there to see about this account, and we both consulted on it.

Q. You were the two creditors of this man? A. Yes; did not know of any others; did not know he was dealing for wood with any one else excepting Freeman, and we felt confident he was not dealing with any one else for coal.

Q. You felt you would be all right? A. Yes; we did not know that other creditors would come in and rank if we sold him out.

Q. Did you then think you could have realized your \$700 out of his property? A. I felt we would.



Q. And that you would be paid in full ? A. Yes.

Q. Did he say anything at all to you about his debt to Mrs. Smith ?  
A. Never heard of Mrs. Smith, nor his father, nor his brother ; only just that he had lent his father \$700.

Q. You took the chattel mortgage and gave him time ; I see it is \$30 a month ? A. Yes.

Q. Why was it you put it in these monthly payments ? A. Because it was impossible to pay a larger sum sooner ; we asked him what he could meet, as he mentioned a larger amount a month, and we said, ' Make it so that you will be sure to meet it ; ' we both said that ; and he said he could meet \$50 a month easy ; and we took that in proportion to the amount of the claims.

Q. And that was the way Mr. Freeman's comes to be in the way of \$20 a month and the other \$30 ? A. Yes.

Q. What did he say as to his capability of being able to meet that ? A. He showed his teams working, getting so much a day, that he could easily meet that ; it was not a large amount, counting his teams.

Q. And you knew of no other creditors, and that was his answer to you upon that paper ; that is all he owed ? A. Yes ; that is all we could find out or did find out.

Mr. Curell who acted as solicitor for Messrs. Myles and Freeman in taking the chattel mortgages, confirms Mr. Myles's evidence, and says that he advised them of the necessity of satisfying themselves about Nicolls's position, and confirms the statement made by the debtor, that he owed only \$200 in addition to their claims ; and he identifies the memorandum referred to given by Nicolls, and taken down by Myles, shewing assets to the extent of \$1,510 in addition to the \$700 alleged by him to be due from his father, and some other debts due to him by other parties. That memorandum is as follows :

STATEMENT OF NICOLLS' ASSETS MADE OUT BY DEFENDANT MYLES.

HAMILTON, Ont.

188 .

FRANK NICOLLS,

Locke and Main Wood Yard,

*In account with Thomas Myles & Son,*

Will give a chattel mortgage to T. Myles & Son and W. A. Freeman jointly, on the following personal property :

|                          |          |
|--------------------------|----------|
| Six horses .....         | \$700 00 |
| Two double waggons.....  | 100 00   |
| Two single waggons ..... | 50 00    |
| Two double harness ..... | 40 00    |

|   |            |
|---|------------|
| Two single harness .....  | \$20 00    |
| Wood cutter and splitter, all complete, now working every day in wood yard, corner Locke and Main ..... | 600 00     |
|   | <hr/>      |
|   | \$1,510 00 |

Only owes one note, 12 months to run for \$200 on one of the spans of horses.

He says he advised that, in view of the fact that he was so completely solvent, there would be no danger in taking the chattel mortgage.

Freeman, the other defendant, gives similar testimony, proving his entire ignorance of the debtor's insolvency; and the solicitor's advice to them that it would be unsafe to take the mortgage if he were not solvent.

There is nothing to impeach the correctness of this evidence. Nicolls, who was examined on commission, does not deny it, but states that he has no recollection of giving the statement of assets and liabilities to Myles.

The evidence at the trial disclosed the fact that Nicolls was hopelessly insolvent, although the account which he gives of his indebtedness to his father and brother, is anything but satisfactory; and looking to the relationship of the parties and the admission made by Nicolls that there was no agreement for payment to his father, I should have but little hesitation in holding that no such indebtedness in fact existed.

There is, therefore, no conflict of evidence, in which case, I quite agree that we ought not lightly to interfere with the findings of fact of the Judge of first instance, however much we might differ from him.

The insolvency was studiously concealed from the defendants at the time they took their security; and we cannot indorse the very sweeping charges of the learned Judge as to the conduct of these defendants and their solicitor, without imputing to them, in the absence of any sufficient grounds, as I conceive, an intention to commit wilful and corrupt perjury, nor without reversing the very wholesome rule of all courts that fraud is a thing to be distinctly proved and not to be presumed.

In speaking of fraud, and I am now speaking of ch. 118, I am aware that my brother Patterson entertains views which may perhaps be correct, that fraud was not an ingredient under that statute, but I am adopting the views of the Court very shortly after its passage, and am of opinion, rightly or wrongly, that any intention to act in fraud of the statute stamped the act as fraudulent in law, and I therefore so speak of the matter as one requiring that the facts to be proved should be such as could lead the judicial mind to no other conclusion than that of fraud.

But I should have held also that there was no evidence of any intent on the part of the debtor either to defeat or delay creditors, or to prefer.

The property was at the time the mortgages were given, in the control of Myles by virtue of his execution. It is true that if he had proceeded to sell, such persons as were creditors, in respect of debts then overdue, might have claimed to participate in the proceeds, but that was not present to the mind of the insolvent, his motive in giving the chattel mortgages was evidently not to prefer these two creditors, but to regain possession of the property, so as to be enabled to continue his business, and by the delay granted to become in a position to pay his debts.

I should have thought, therefore, that under the former law these mortgages could not have been impeached.

What then is the effect of the recent statute 48 Vict. ch. 26 (O.), upon such a transaction which literally read appears to render the intent immaterial if the effect be to delay creditors, or to give a preference.

In placing a construction upon that Act we have to consider what was the then state of the law which the legislature proposed to amend. It recites that great difficulty was experienced in determining cases arising under the present law (that is to say, R. S. O. ch. 118), and it would be affectation to pretend to shut one's eyes to what we all know that difficulty was, viz., the applicability of the doctrine of pressure to cases arising under the Act, that

a person who knew himself to be insolvent, and who made a transfer to a person also aware of his position, should not be allowed to shield himself by shewing that the transfer was made under pressure, and that therefore a transaction made under those circumstances ought not to stand.

If that be the true construction of the amendment, no exception can be urged against it, but if it is to have the wider construction contended for by the plaintiff so that any transaction, however honest, and where there was no intent on the part of the debtor to prefer, and no knowledge on the part of the creditor, may be invalidated at any length of time subsequently, because the creditor, by means of a security obtained under such circumstances gains a priority or preference over other creditors however just, it must, so far as I am concerned, be left to a higher tribunal so to decide. I think it would probably be found that such a construction would more frequently work injustice than have the effect of securing equality.

I find it very difficult to distinguish this Act from that under which *The Bank of Australasia v. Harris*, 15 Moo. P. C. 97, was decided.

That Act in section 5 defined certain things as acts of insolvency, among which were fraudulent alienations of property.

Sec. 6 declared that every alienation, &c., made by a person who at the time was actually insolvent, should be fraudulent and void.

Sec. 7 declared that all alienations, &c., made by any person after he has contracted any debt, and within twelve months preceding the commission of any act of insolvency or preceding the sequestration of his estate, or preceding any time at which it shall be made to appear by proof that he was actually insolvent, to any person without valuable consideration, shall be liable to be set aside at the instance of any creditor whose debt was contracted, or the cause of whose debt had arisen prior to the making of such alienation, &c., in so far as such creditor would thereby



be prevented from recovering the full amount of his debt.

Sec. 8, that all alienations, transfers, or mortgages of any estate, real, or personal, &c., made by any person being insolvent, or in contemplation of surrendering his estate as insolvent, or within sixty days preceding the making of any order for sequestration of his estate as insolvent, and having the effect of preferring any then existing creditor to another, should be, and was thereby declared to be absolutely void.

Sec. 9 validated all subsequent bonâ fide transfers by the person preferred, &c., but made that person liable for the proceeds.

And sec. 12 provided that all payments bonâ fide made by an insolvent before the order of sequestration was known to him or such creditor should be valid.

The Judicial Committee there held that notwithstanding that the other sections referred to fraudulent alienations, and that section 8 omitted all reference to fraud or intent; the words "having the effect of preferring" indicated a fraudulent preference, and were not intended to refer to any case of a preference not fraudulent; but whether that was so or not in the full sense of fraudulent preference as generally understood, they were satisfied that the words in question were not intended, and ought not to be construed to extend to a case in which there was not only no intention to prefer, but in which the preference, if such there were, arose merely from the circumstance that the defendants, when they accepted the bill, were creditors of the insolvent, whereas by accepting the bill they had represented themselves to be debtors, and had authorized third persons dealing with the bill to consider them as such.

Our own Act does not contemplate any judicial proceeding like a sequestration, as in the Queensland Act, and perhaps the words "on the eve of insolvency" have no very clear meaning in our Act, but the other words, "in insolvent circumstances, or unable to pay his debts in full," should probably receive the same construction as the Privy Council placed upon the words of the Queensland Act, and

thus we find our Legislature enacting almost in identical language that any transfer by such a person which has the effect of delaying or preferring creditors should be void.

I am unable to distinguish between the two enactments, and as that decision was a decision of the ultimate Court of appeal from the Courts of this Dominion, I feel myself bound by it.

The decision itself has, on many occasions, been considered by the Courts here, and by this Court in the case of *Davidson v. Ross*, 24 Grant 22.

I do not think the view I am now expressing at all conflicts with what I said in that case.

We were then dealing with a Bankrupt Act, and the point decided was, that if a person made a transfer in contemplation of insolvency, that is to say, with intent to defeat the general distribution of his estate which takes place in insolvency, and the effect of that would be to give an unjust preference that transfer was avoided, although not actually fraudulent. It appeared to me that, as in other sections to be found under the same heading, the transactions invalidated were described as fraudulent whilst in this particular section the word "unjust" was substituted, we were bound to give effect to that language. But I am free to say that if the word "unjust" had been omitted in that Act, I should have hesitated long before coming to the conclusion that any but a fraudulent preference, as that term is usually understood, was intended. I thought there was there a clear indication on the part of the legislature to substitute an unjust preference for a fraudulent preference, but I should I think in that case, as in this, have followed *Bank of Australasia v. Harris*, if that word had been omitted.

Under the Act, as it stood before the amendment although there was some difference of opinion, the weight of judicial authority, greatly preponderated in favor of the view that in order to work a fraudulent preference there must have been a concurrence of intent so to do on the part of both debtor and creditor. If it was the intention

of the Legislature to effect so radical a change as it is said has been done by this amendment, we should have expected to find all reference to intent omitted and a simple declaration made that all gifts, &c., which have the effect of defeating or delaying creditors or giving one or more a preference, should be utterly void.

The retention of those words seems to indicate that the prominent feature in the legislation was to avoid such acts as were made with the prohibited intent, and although it may be difficult to place a construction upon the added words read in connection with the words retained, in the light of the decision of the Privy Council in the *Queensland Case*, I should be disposed to read the clause as intended to invalidate any act fraudulent in the sense of being in violation of the statute, if it had the effect of defeating or delaying creditors or giving one or more of them a preference over others.

If what was intended was to prevent the debtor asserting that he was not doing the act with the prohibited intent simply because in doing what he did he was acting under pressure, it appears, I am free to admit, a very clumsy mode of attaining the object in view; and I should be inclined to say, fails to carry out its object, but to place the wider construction contended for upon the words, would lead to such cruel results that we should hesitate before adopting it.

Mr. Justice Gwynne, in commenting on the language of the former Act, says :

“The statute does not say that all conveyances, &c., executed by a person in insolvent circumstances, even though executed to procure the cessation of legal proceedings to recover a just debt, and to avoid the injurious and probably ruinous consequences attending a judicial sale under an execution in the suit shall be void, but that all conveyances so executed with intent to delay creditors, or to give one creditor a preference shall be.”

If the law is to be left in its present state, and the construction contended for be adopted, it is quite impossible

to foresee to what unjust and disastrous results it may not lead.

As the law stood under the R. S. O. ch. 118, the party to avail himself of the Act was a creditor who had placed himself in a position to seize the property under an execution. A simple contract creditor might probably have taken an action to have the security declared void, but unless he could follow that up by an execution, it was a very barren proceeding.

Under section 7 of the present Act, the assignee is the only person entitled to bring an action, and it was urged that as the property covered by the mortgage had been sold before the plaintiff's right accrued, the transaction being good between the parties, and not having been avoided whilst the goods remained in specie, cannot now be impeached ; in other words, though voidable while the goods remained in the possession of the mortgagee, ceased to be voidable after the goods were converted into money. No doubt, under the former law, if the property was converted before the creditor came with his execution, he was without remedy.

Since *Marks v. Feldman*, in appeal, L. R. 5 Q. B. 275, though a contrary opinion was expressed by all the Judges in the court below, it is clear that an assignee in bankruptcy could avoid the transaction by demanding the money where the property has been converted into money ; and if therefore the assignee could have avoided the transaction by demanding the goods, he might probably without the aid of section 8, have avoided it by demanding the money, and all doubt would appear to be removed by that section.

Here the transaction was, on the hypothesis that it comes within the Act, voidable at the election of the assignee from the day on which the assignment was executed, and the position and rights of the parties cannot be better described than in the following extract from Chief Baron Kelly's judgment in the case I have referred to :

“ The only difference is, that whereas the remedy would be an action in trover after a demand—that is after an



avoidance by way of demand while the goods were in specie, and in the hands of the transferee—when the goods have been converted into money the assignee becomes entitled to maintain an action for money had and received after a demand for the money so had and received.”

There is evidence here that the assignee elected to avoid the transaction.

We are dealing in this case with a mortgage upon property which passed to the assignee under the assignment; perhaps a more difficult question might arise where the transaction impeached is an absolute transfer, and where therefore no interest whatever would pass to him under the assignment.

The general principle on which the courts of equity acted before the Judicature Acts with regard to the remedy given to creditors in an action to impeach a deed, was simply to declare the deed fraudulent and void as against the creditors, leaving them to take such other proceedings as might be necessary to enforce their right against the property which was the subject of the conveyance. It is true that since the Act the full remedy may now be sought in the one proceeding if the creditor's debt is due; but, if not, the judgment merely declares the conveyance fraudulent.

In the case of such an absolute transfer the creditor impeaching it, if a simple contract creditor, could obtain simply a declaration removing it out of the way so as to let in his execution if he ever obtained one: the assignee now has the exclusive right to sue, but his rights, I assume, are no higher than those of the creditor, and a question may arise how he is to realise from the property.

The assignee under the assignment takes only the debtor's interest. In the case supposed, he would have no interest, and the assignee has only the special rights conferred upon him by the statute. It may be that as in the *Clarkson Case*, there is no power vested in him to recover the property for the benefit of the estate.

In the case referred to by my brother Patterson of a person dying who had made a fraudulent transfer, no

doubt the creditors remedy would still exist, but though it is said the property would be assets in the hands of the executor, which is perfectly true, it is equally true that the executor could not sue to obtain possession, his title would be no higher than that of the testator.

Here the Act does not say that the impeached transaction shall be void as against the assignee, but it is against creditors; and the right which the creditor previously had is transferred to the assignee; the creditor could not in the absence of an execution realise from that property; and it may be that the assignee has no higher rights, and that by the effect of section 7 the creditor may be deprived of a right he previously enjoyed.

It will be time enough, however, to deal with these questions when they arise. The present case is not a case of that description, but is not, I think, brought within the statute.

The uncontradicted evidence of the mortgagees, their solicitor and the insolvent fails to shew any intent to defeat the Act but the reverse, and if their evidence is struck out, the only facts proved are the insolvency of the debtor and the transfers in fact.

I think the appeal should be allowed, and the actions dismissed with costs.

PATTERSON, J. A.—The findings of fact by the learned Judge, who tried these actions, bring the mortgages which Nicoll, the debtor, gave to the defendants, distinctly within the second section of the Act of 1885. From a perusal of the evidence I am of opinion that his conclusions are fully supported. I had at one time thought, that grounds tending to support the transactions might be found in connection with the position of the parties immediately before the mortgages were given, Myles being in fact a judgment creditor, and both defendants being able to give some evidence of their motives being to help Nicolls in his business; but the more I examined the evidence, the stronger the grounds appeared for the views taken by the learned Judge.

Upon the findings of fact the mortgages might be held void under the Act as it stood in R. S. O. ch. 118, and a fortiori under the present Act.

The questions of law are fully covered by what I have said in *Edgar v. The Central Bank*.

I think the appeal should be dismissed.

OSLER, J. A.—It is hardly necessary, except as regards further proceedings, to determine the other questions raised in these actions.

In *Kennedy v. Freeman*, not having heard the whole argument on the facts relating to insolvency of the grantors, I express no opinion as to that; but upon the question of the construction of section 2 of 48 Vict. ch. 26, I wish to add a few words.

The Legislature has been extremely unfortunate if its repeated efforts (47 Vict. ch. 10, sec. 3; 48 Vict. ch. 26, secs. 1, 2) to amend or alter the meaning of the original section (R. S. O. (1877), ch. 118, sec. 2) have not been more successful than they are now said to have been.

That the principal defendants Freeman and Myles had executions in the sheriff's hands which bound their debtor's goods, there is no doubt. If they had been sold the proceeds would have been distributable under the Creditors' Relief Act.

These executions were abandoned, and the chattel mortgage in question taken from the debtor.

It may be admitted that as the law formerly stood this mortgage could not have been impeached, because the fraudulent intent, that is, the intent to prefer, would have been rebutted by reason of the pressure exerted by the creditor's mere demand for payment or security: *Slater v. Oliver*, 7 O. R. 158; *Long v. Hancock*, 12 S. C. R. 532; *Re Boyd*, 15 L. R. Ir. 321 (1885), where the authorities are collected and reviewed.

Whenever section 2, R. S. O. ch. 118, and its predecessors have not been in abeyance, (for it may be said to have been temporarily superseded while the insolvent Act of

1864 and subsequent Acts were in force) it has been uniformly held in Courts of last resort, to avoid fraudulent preferences only. We have now to deal with a new section representing the collective efforts of two sessions of the legislature to alter the judicial construction which had been placed on the former section. I think it says in plainly expressed words, that if either the intent or the effect of the transaction is to prefer, that is all that is necessary to avoid it.

I consider the *Bank of Australasia v. Harris*, 15 Moo. P. C. 97, wholly inapplicable. The decision in that case is put expressly upon the construction, not merely of a section containing words similar to those in our Act, but of several other sections, taking all of which together, the Lords of the Privy Council thought that what was struck at was a fraudulent preference. The course pursued by our legislature on this subject, shews that it has anxiously endeavoured to make the validity of a security given by a person in insolvent circumstances, turn absolutely upon its being a preference in intent or in effect. But the existence of the intent to prefer is no longer essential. All that is necessary to shew, as I read the Act is, that the debtor was in insolvent circumstances. If so, he should have made an assignment for his creditors generally; for he cannot, except in the instances specially permitted, give one of them a security which shall be effectual against them or the assignee.

The advance upon the line of insolvency legislation is in this respect well marked.

I cannot see that it makes any difference that the creditors taking the security happened to be execution creditors. That merely shews that they appreciated the effect of the Creditors' Relief Act.

The intention to give and to obtain a preference in this case is palpable.

The creditors abandoned a security—an execution—which gave them no preference or priority over other creditors, and took another which would effectually do so, if only they could retain it.



The effect, if not the intent of this, was to obtain a preference. By abandoning their executions they hindered and prevented other creditors from obtaining the benefit of the Creditors' Relief Act, and excluded them by taking a security of which no one could have any advantage but themselves.

[In this case the appeal was allowed with costs; PATTERSON, J. A., dissenting. HAGARTY, C. J. O., and OSLER, J. A., were of opinion that although the debtor was insolvent the Act under which the plaintiff sued was ultra vires. BURTON, J. A., although of opinion that the Act was intra vires, held that there was no *intent* to defeat the Act, and therefore that the defendant's mortgage was valid; and PATTERSON, J. A., while agreeing with BURTON, J. A., that the Act was intra vires, held that the mortgage was invalid, having been made when the debtor was in fact insolvent.]

#### HUNTER v. DRUMMOND.

THIS was an appeal by the defendants from the judgment of Rose, J., pronounced on the 21st of October, 1886, finding the defendants liable to pay certain moneys to the plaintiff.

The statement of claim shewed that plaintiff was the assignee for the benefit of creditors of Olmsted Bros., by virtue of an assignment for the benefit of creditors under the provisions of 48 Vict. ch. 26 (O.,) bearing date the 15th of July, 1886.

That on or about the 25th of June, 1886, Olmsted Bros. being indebted to the defendants and then and for some time unable to pay their debts, transferred and delivered to defendants a quantity of iron of the value of \$615 on account of such indebtedness which it was alleged had the effect of giving the defendants a preference over the other creditors of Olmsted Bros. to the extent of the value of such iron, and the defendants did not by reason thereof lose or give up any valuable or valid security for the payment of the Olmsteds' debt; and therefore plaintiff asked to have it declared that such transfer and delivery were void; and that defendants held such iron as trustees for plaintiff and for other relief.

The defendants by their statement of defence set up that in March, 1886, the defendants agreed to sell to Olmsted Bros. a quantity of iron, to be delivered by the defendants at Hamilton, and to be paid for by Olmsted Bros. by their note when the same should be weighed and accepted by them. In the month of June following, the iron arrived at Hamilton, and upon being weighed by Olmsted Bros., they claimed that it was short in weight and advised the defendants thereof, offering at the same time to the defendants their note payable in four months for \$863, which would be the price according to their weighing. Afterwards and on the 23rd of June, one of the defendants' firm, in good faith, entered into a new agreement with Olmsted Bros., by which they sold them a lesser quantity of iron and received their note therefor in settlement, the defendants returning the note of \$863, and releasing Olmsted Bros. from their obligation to take more of the iron, and defendants received back the balance of said iron.

Defendants further raised the question as to the validity of the statute (48 Vict. ch. 26), and claimed the same benefit from such defence as if they had demurred to the statement of claim.

*Guthrie*, Q.C., for the appellants.

*Osler*, Q.C. and *H. S. Osler*, for the respondents.

The points relied on were similar to those in the other cases.

PATTERSON, J. A.—We disposed at the argument of all the questions raised on this appeal with the exception of the right of the plaintiff as assignee for the benefit of creditors to maintain the action.

For the reasons given in the case of *Edgar v. The Central Bank*, I think he has the right and that we should dismiss the appeal.

The Court being equally divided, the appeal in this case was dismissed with costs.

## CLARKSON V. STERLING.

*Statutes—Non-retrospective operation of 48 Vict. ch. 26 (O.)—Preferential transfer—Prior agreement to give security.*

The defendant who was employed as financial manager of a firm advanced to them a large sum of money to be repaid on his giving six months notice demanding payment, on default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but although repeated demands for payment were made by defendant nothing was done until 19th December, 1885, when a transfer to him of certain securities was made by the firm who within two months made an assignment under 48 Vict. ch. 26 (O.), which came into force on 1st September, 1885.

In an action by the assignee under that statute to recover back the amount realised from the securities, it was

*Held*, that whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law.

Whether the effect of the statute is to alter the law in this respect, *Quære*.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division refusing a motion to set aside the judgment entered for the defendant at the trial of the action, and to enter judgment for the plaintiff.

The facts giving rise to the action and the points raised are so fully stated in the report of the case in the Court below (14 O. R. 460), as to render any lengthened statement here unnecessary.

The appeal came on to be heard on the 17th of April, 1888.\*

*J. Maclellan*, Q. C., for the appellant. This transfer of securities should not, under the circumstances appearing in evidence, be allowed to stand. The defendant who was the financial manager of the partnership business carried on by Brayley, McClung & Co., as such was cognizant of the true position of the affairs of the firm, and fully aware of the utterly hopeless state they were in, and on his own examination he admitted that at the time his security was obtained the business could not be carried on unless outside aid was obtained, but which assistance never came; not-

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

withstanding this he quietly lies by from July,—when according to the terms of the agreement between the firm and himself the debt was due, and if not paid he was in a position to call for security—until December, when the transfer to him was made which was within about sixteen days of the complete suspension of the business, and the ceasing of all payments by the firm. This delay alone according to *Ex parte Fisher*, L. R. 7 Ch. 636, as stated by the Court (p. 644) “is evidence of an intention to commit an actual fraud upon the general creditors.” This firm was clearly in “insolvent circumstances” within the meaning of the 48th Vict. ch. 26 (O.) as defined by Boyd, C., in *Warnock v. Kloepper*, 14 O. R. at p. 292 (a).

Geo. Kerr, for the respondent. The evidence in the case establishes the fact that the dealings of Sterling with the firm were carried on in good faith; the Court below finds and the appellant feels constrained to admit the same; in this view therefore there was no offence against the Act and the case cannot be brought within it. Here the agreement for security was entered into long before the Act came into force; and to hold that it affected this transaction would be to give the statute a retroactive effect; it being admitted on all hands that without it the plaintiff is not entitled to any relief: *Teale v. Younge*, McL. & Y. 486; *Davidson v. Douglas*, 15 Gr. 347; *Burns v. McKay*, 10 O. R. 169; *Building and Loan Association v. Palmer*, 12 O. R. 1; *King v. King*, 2 Ch. D. 256; *Re Dungate—Ex parte Chester*, 1 Ch. D. 293, were referred to.

May 8, 1888. HAGARTY, C. J. O.—The defendant advanced \$15,000 to the insolvents in August, 1884.

By contemporaneous agreement under seal, it was provided that it was to be repaid to him any time after 15th January, 1885, upon defendant giving them six months notice in writing. They covenanted if they made default in payment on notice, they would forthwith assign to him bills receivable or debts due them of sufficient value to

(a) Affirmed in Appeal, 12th Sept. 1888.



satisfactorily secure the repayment of the loan and interest.

They reserved power to repay him at any time on six months notice.

On 15th January, 1885, defendant gave them notice in writing requiring payment on the 15th July then next.

When that time arrived, he applied for payment, but they put him off. He demanded the security promised; this was done several times. He represented that they deferred payment on the ground that they expected some person to join them in the firm, &c., and kept putting him off. He did not, in fact, get his security until the 19th December, 1885, when they assigned a large quantity of debts due them, not exceeding \$20,000, with a list attached, reciting that this was done in pursuance of the contract of the 16th August, 1884.

On the 11th February, 1886, in pursuance of Act 48 Vict. ch. 26, they assigned all their estate to the plaintiff as assignee for creditors.

The defendant has collected considerable moneys mentioned in this transfer to him.

It seems conceded that it is only by force of this last mentioned statute that plaintiff can recover.

At the trial the late Sir M. Cameron dismissed the action. He considered that the plaintiff had not made out "beyond speculation or conjecture," that the defendant's security was made by persons insolvent or on eve of insolvency.

The Divisional Court refused to disturb his finding.

The chief ground of decision was, that the proof failed as to the essential point in the right to avoid the deed—viz., that it was given by a person insolvent or on the eve of insolvency.

Before discussing that point, it may be well to consider whether the deed is assailable under the statute.

It did not come into force until the first day of September, not only long after the making of the original contract on which the right to this security was created, but some time after the right to have this security given was complete—viz., 15th July.

At that date the defendant was in a position to insist on immediate payment or the giving of the stipulated security.

He could have obtained a decree for immediate relief from the Court. If the security had then been given, it was free from objection; there is no evidence of insolvency for some months afterwards. Such were the defendant's rights in July.

There is no case made out against him of any voluntary abstention from enforcing his security, with any view of protecting the debtor's credit, or merely refraining until insolvency was imminent to bring the case within *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Kilner*, *ib.* 245; *Ex parte Izard*, L. R. 9 Ch. 271; *Ex parte King*, 2 Ch. D., 256.

We have then to consider first, whether the statute applies to such a case merely because the deed giving the security was not actually executed until December, when the Act was in force and insolvency was existing according to one view of the evidence; second, even if the statute be applicable to the case, whether under the cases cited, recognizing the doctrine of *Mercer v. Peterson*, L. R. 23 Ex. 394; on Appeal L. R. 3 Ex. 104., the position of the parties, and the legality of the security, must not be considered as it was in July, when the defendant's right to get it was complete.

On the first point, the general rule may be stated that the operation of a statute is confined to matters which arise after the passing of such Act, and does not affect any right or title already existing.

The point as to the retrospective character of a statute, seems well put in *Hardcastle*, 208: "It may be well to say a word as to the meaning of the epithet 'retrospective,' as applied to a statute: 'A statute,' says Theodore Sedgwick, 'is to be deemed retrospective which takes away or impairs any vested right acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect to transactions or con-

siderations already past.' But a statute is not properly called retrospective, merely 'because a part of the requisites of its operation is drawn from a time antecedent to its passing.'"

I may refer to the language of my brother Patterson, in delivering judgment in this Court, in *Fowler v. Vail*, 4 A. R. 275, and the cases cited by him; also to *Moon v. Durden*, 2 Ex. 41.

It appears plain to me that in July defendant had the undoubted right to claim this security. If he had then commenced proceedings, and by delay in hearing his case, or in giving the judgment of the Court he had not actually obtained the security till the 19th December (when his deed was executed) I think it clear that it must be construed as of the time in July when he took his proceedings.

I do not think that the statute that came into force in September should be construed as imposing its provisions on the assignment as of the actual day of execution. It certainly would be giving it a retrospective operation, as in the words quoted, "taking away or impairing a vested right."

I think the second section must be read as applicable to all future assignments made in contravention of its express terms, but not to those made expressly in fulfilment of a valid pre-existing contract, and which merely by the wrongful delay or evasion of the debtor had been delayed until a state of things supervened which rendered it assailable under the new law.

As already noticed there was no case made against the defendant to bring him within the *ex p. Fisher* doctrine. The rule in *Mercer v. Peterson*, is admitted.

In *Ex p. Fisher*, Sir Geo. Mellish says, at p. 644 :

"We do not think this will protect transactions where the giving of the bill of sale is purposely postponed until the debtor is in a state of insolvency, in order to prevent the destruction of his credit which would result from registering the bill of sale. We think such a postponement is evidence of an intention to commit an actual fraud upon the general creditors."

In *Ex p. Burton*, James, L. J., (p. 108) says: "A Court of Equity regards that which has been agreed to be done as done, and therefore it has said that if it was really part of the understanding when the money was advanced, that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement." He then points out that *Ex p. Fisher*, established this exception upon that exception to the rule, and as the evidence shewed that the bill of sale was not to be signed till the borrower "had lost the confidence" of the lender, it would not avail.

The same point is very fully discussed in *Ex p. Kilner* 13 Ch. D. 245 by Baggallay and Thesiger, LJJ.

I see nothing in the case before us to impugn the bona fides of the defendant, and I think he must be acquitted of all design to favor the debtors by purposely delaying, the actual giving of the security. I think he was entitled to it as of July, when it was not open to any objection, and when the statute was not in force.

I am not prepared to decide that it cannot be supported on the grounds stated in the Court below, but I rest my judgment on the doctrine of the cases cited.

I am inclined to hold that the statute was not intended to apply to an assignment made as this was in pursuance of a pre-existing binding agreement made for valuable consideration under the then state of the law.

BURTON, J. A.—It is not necessary, in my view of this case, to consider the question of whether at the time of the transfer the debtor was in insolvent circumstances, within the meaning of the statute, although I do not feel the difficulty of dealing with that fact suggested in the reasons against the appeal, by reason of the finding of the learned Judge at the trial, and its affirmance by the Divisional Court. The facts are not in dispute, the sole question is, whether the proper inference has been drawn from those facts.

The result has shewn beyond all possibility of question that the debtors were, in December, in insolvent circum-



stances and unable to pay their debts in full, and that the debtors must have known it.

I think the proper mode of dealing with that question was that adopted by the late Chancellor, in *Davidson v. Douglass*—viz., to ascertain whether all the property was sufficient to meet the debts in case the creditor declined to extend the time for payment, but insisted upon being paid as their debts matured, or in other words, what it would bring in the market at a forced sale.

But I am of opinion that the actual transfer must relate back either to the time of making the agreement, or the time when the defendant was entitled to insist on its performance and made the request. That agreement, and the request under it, having been made in perfect good faith, as found by the learned Judge, the transfer cannot be brought within the statute without giving to it a retro-active operation; and I am further of opinion that it is open to very grave doubt whether, under the 7th section of the Act, there is any power in the assignee to recover back this property.

At the time of the assignment for the benefit of creditors, the assignor had made the transfer in question of these debts to the plaintiff; they did not therefore pass under the assignment.

It is true that the right which a creditor formerly had to bring an action to impeach such a transaction, is taken away and vested exclusively in the assignee. That, and that alone, is the power conferred upon the assignee. What then were the rights of a simple contract creditor before the Act? He could obtain a declaration that a transaction sought to be impeached, was void, and if in a position to obtain judgment might, in addition, get execution so as to enforce his remedy against the property; but if his claim was not due so that he was not in a position to obtain execution, any other creditor who had obtained execution, could step in and seize the property for his own benefit. Now in the Insolvent Act formerly in force, there was a provision similar in its terms to this; but that was not the authority to recover

the property; in subsequent clauses, certain transactions are declared fraudulent and void, and then the assignee was empowered to recover back the subject thereof for the benefit of the estate, in any Court of competent jurisdiction; and so again under the 134th section of that Act, payments made in fraud of the Act, are not only declared void, but that declaration is followed by this provision, "and the amount paid may be recovered back by suit in any competent Court for the benefit of the estate."

Then is sec. 7, extended by sec. 8? It does not seem to me to receive any extended meaning in that section.

If the property included in the impeached transfer has been sold, then the moneys or other proceeds realised therefor may be seized or recovered in any action authorised under sec. 7, as fully and effectually as the property if still remaining in the control of the transferee in the impeached transfer could have been seized or recovered.

That is to say, if the property itself could have been *seized or recovered* in an action under sec. 7, the proceeds may be; but if there was no power under sec. 7 to seize or recover, there would be no power to seize or recover the proceeds.

There are of course cases under sec. 7, where the property could have been seized or recovered; where, for instance, property passing by the assignment was subject to a mortgage which it is claimed was fraudulent, and which has been declared fraudulent in an action under that section.

It is to my mind very questionable whether the Legislature feeling the difficulty in dealing with questions which might appear to trench on the debatable domain claimed to belong exclusively to the Dominion Parliament, and covered by the words "bankruptcy and insolvency," have not designedly abstained from vesting the full powers formerly vested in an assignee in insolvency in an assignee under this Act; but however that may be, I feel that it is at least questionable whether there is any power in the assignee to sue for the recovery back of these debts, or the

proceeds for the benefit of the creditors, although I place my judgment on the ground that we cannot give a retrospective operation to its provisions so as to defeat an agreement valid at the time it was made.

I retain the opinion expressed in some recent judgments that the Act itself is not *ultra vires*.

I think that the appeal should be dismissed.

PATTERSON, J. A.—I agree that this appeal should be dismissed on the grounds stated in the judgment of his Lordship the Chief Justice.

In applying the law against preferential assignments, we must, in my opinion, regard this transaction as of either the date of the agreement of the 16th of August, 1884, or as of the 5th of July, 1885, when, under that agreement, the defendant became entitled to have the transfer made which is now attacked. As far as the operation of the law is concerned it matters not which of those dates is adopted, because the insolvency came after both dates. I am inclined to think it should be the earlier date; but I should not like to venture that as a positive opinion without more maturely considering the effect of the option to pay the money or give the security at the end of the six months after notice.

The constitutional question which was recently before us in cases under the statute 48 Vict. ch. 26, (a) is in this case raised only formally and without any idea of its being re-discussed, and some other questions on the construction of the statute are, as I understand, to be treated as in the same position.

I wish, however, to say that, while I hold that debts such as those transferred to the defendant, would pass to the assignee for the benefit of creditors under the effect given by section 4 to the assignment, and while I do not see any difficulty in construing section 7 with the aid of light thrown on it by section 8, as empowering the assignee to recover for the creditors the effects which are the sub-

(a) *Clarkson v. Ontario Bank, &c.*, ante 166 et seq.

ject of transactions for the rescission of which he may sue, I wish to leave entirely open, so far as my opinion is concerned, the question whether debts like these are among the property or effects touched by section 2.

OSLER, J. A.—I think the judgment should be affirmed. So far as this Court is concerned, I assume that the 48 Vict. ch. 26, is to be treated as *intra vires* the Provincial Legislature; but I am of opinion that the transaction complained of is not within that statute, and is governed wholly by the former Act. Under that Act such an agreement to give security, as we have before us, was not invalid, and the defendant's right to enforce it accrued long before the present Act came into operation. That Act is not retrospective, and therefore the defendant's right to take the security contracted for, as and when he did take it, is not affected. It is not necessary in this action to consider the questions which have been argued as to the scope and construction of sections 2, 7 and 8 of the present Act, or whether such an agreement would now be invalid. For the reasons given by the Chief Justice of this Court whose judgment I have had an opportunity of reading, I agree that the appeal should be dismissed.

*Appeal dismissed with costs.*

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## PURDOM v. NICHOL.

*Principal and surety—Promissory note—Novation—Subrogation.*

The plaintiff indorsed an accommodation note of N. as collateral security for two mortgages on the real estate of N. in the hands of one R. amounting together to \$7,323.08. Subsequently B. entered into partnership with N., and R. agreed to deduct \$1,000 from his claim against N. on condition that B. became jointly liable for it. To effect this, R. for the expressed consideration of \$6,323.08 conveyed the mortgage property to B. and N. and they joined in executing a mortgage to R. for that amount payable in two years. In effecting this arrangement the accommodation note was not taken into account, and B. knew nothing of it. Within a year thereafter, B. and N. dissolved partnership, and, as between themselves, B. agreed to pay R's claim.

The plaintiff without any knowledge that B. had any connection with the matter paid the amount of the accommodation note to R. who gave credit to B. on a settlement of his indebtedness, for the amount so paid. On discovering the facts the plaintiff claimed from B. the amount so paid to R. on the ground that the plaintiff had so paid it as surety for a debt for which B. was liable and who received the benefit of such payment on the mortgage debt.

*Held*, (reversing the judgment of the Q. B. D.), that the money was paid to the use of N., not of B., and that plaintiff's highest right was to be subrogated to the rights of N. against B. and

*Seemle*, the effect of the dealings between R. and B. and B. and N. was to discharge the plaintiff from all liability.

THIS was an appeal by the defendant Baechler from the judgment of the Queen's Bench Division reversing a judgment of Cameron, C. J.

The action was commenced 29th December, 1884, and was tried at London, 12th May, 1885, before Cameron, C. J., without a jury, who, after taking time to look into the authorities, dismissed the plaintiff's action as against the defendant Baechler with costs.

Afterwards a motion was made to the full Court to set aside that judgment, and enter judgment for the plaintiff, when an order was made on the 8th of March, 1886, setting it aside, and directing judgment to be entered for the plaintiff against the defendant Baechler for the sum of \$600 and interest from the 10th of May, 1879, with full costs of the motion and action; and from that judgment the present appeal was taken.

The plaintiff by his statement alleged :

That defendant Nichol on the 14th April, 1875, made his promissory note to the plaintiff for \$500, payable to the plaintiff with interest at eight per cent. per annum, four years after date, which was indorsed by plaintiff and handed to defendant Nichol for his accommodation.

That Nichol delivered that note to one Barton as collateral security for the payment of a mortgage held by Barton, on the planing mill and machinery of Nichol.

That the defendants thereafter entered into co-partnership to run the said planing mill and other machinery upon certain terms set out.

That such co-partnership continued for eight months only, when it was dissolved upon the agreement that defendant Baechler should pay the defendant Nichol \$600 for his interest in the business; should assume the business and collect all debts due the firm, and pay all the liabilities including the mortgage to Barton; and that the defendant Baechler collected the debts, sold the property, mill machinery, and other assets of the firm.

That the said note became due on the 17th of April, 1879, and the plaintiff was compelled to pay it, but neither of the defendants had repaid him.

And the plaintiff claimed the amount of the note and interest thereon till judgment.

The defendant Baechler by his statement of defence alleged :

That he was ignorant of the dealings between his co-defendant and the plaintiff, but admitted that they were at one time in partnership and had dissolved the same.

That the defendant Nichol collected and received from the assets of the partnership money greatly exceeding the plaintiff's claim for anything he was entitled to receive thereupon or from him (Baechler); and claimed that upon a proper taking of the accounts between him and Nichol, Nichol would, by reason of his indebtedness to him, not be entitled to ask him to pay the note in question, and submitted that the plaintiff with whom he never had any dealings whatever, could have no higher right than Nichol; and claimed to be dismissed with costs of suit.

It appeared from the evidence at the trial that Nichol was the owner prior to the transactions referred to, of certain lands in Stratford, on which was erected a planing mill. That on the 19th of January, 1872, Nichol conveyed the said lands to David Barton by way of mortgage, for securing the sum of \$1,000, with interest. That on the 12th of April, 1873, Nichol, for the expressed consideration of \$1,000, conveyed these lands to James Redford and David Barton, by way of security for moneys by them severally advanced to Nichol. In April, 1875, Redford and Barton instructed their solicitor, Mr. McPherson, to try and collect \$2,000 from Nichol without suit.

In his evidence Mr. McPherson stated :

“ I saw him, and said I thought his friends ought to assist him to that extent, and he said he would try, and he went away and in a week or two he came back and said he had not been able to raise any money. Then I made the other suggestion that instead of paying the cash if he could get his friends to indorse notes, and I prepared four notes for him of \$500 each not writing in the names of the indorser, and gave him these four notes to get signed ; he was away some time, perhaps a couple of weeks, and brought me back three of them. They were received in that way, whether as collateral I cannot recollect. Q. Barton had held the note of the plaintiff prior to the time that mortgage was taken? A. Yes, or I had held it for Barton and Redford ; this note of the plaintiff that is sued on now. Q. Did you continue to hold it after that mortgage was taken? A. Yes. Q. After the mortgage was given did you hold it as collateral security to that mortgage? A. Well I do not know whether there was ever anything said at all about how it should be held. There never at anytime was anything said that I can recollect, of the note being held as collateral security, though that might be the effect of it. Q. At all events did you have any claim against Nichol and Baechler outside of the amount stated in the mortgage? A. No claim outside of the amount that was stated. His Lordship. But the mortgage might be collateral to the note, rather than the note collateral to the mortgage? A. It might be. Q. by counsel. Any more than the mortgage was for a larger sum. Do you know as a matter of fact whether the mortgage was collateral to the note or the note to the mortgage? A. I cannot recollect of anything being said about it at all, of there being any arrangement at all. I don't think that when the mortgage was made that Baechler knew anything whatever about the notes. Q. He made the mortgage then in ignorance that this note was in existence? A. As far as I know he had no knowledge of it. I know my idea was in taking Baechler's covenant he (Barton) would have the additional security of Baechler's covenant. Q. Then when the money was paid was it credited on that mortgage ;—the money paid on the note?

A. Purdom's money. Q. Yes. A. Well it was credited on the indebtedness. Q. And was the indebtedness represented by the mortgage? A. the indebtedness was represented by the mortgage. Q. Is that agreement signed by Xavier Baechler? A. Yes it is his signature, and I signed it as witness. Cross-examined. Q. Barton was the only party to whom the note was given at first? A. Yes. Q. Baechler had nothing to do with the transaction at all? Not for a year afterwards. Q. And yet you say Baechler never heard of the note? A. Not that I ever heard of, not that I ever knew of. Q. Even down to the time that you were crediting him on the mortgage? A. I think he had ceased at that time to have much interest in it. Q. At the time he signed this agreement he was insolvent? A. Oh yes, insolvent. Q. It was practically a matter of no consequence what he signed? A. He never examined the agreement. He took my figures for it in signing that agreement of the 15th January 1881. Q. It was a desirable thing to get the property sold without costs? A. Yes. Q. And he was quite willing that you should sell the property, and to facilitate your selling it held himself liable for anything you chose to say he was liable for? A. That was the position. Q. At the time you got his covenant he was supposed to be quite good? A. Yes. Q. That is the covenant in the mortgage? A. Yes."

The appeal came on for hearing before this Court on the 8th and 9th of September, 1887.\*

*Idington*, Q.C., for the appellant. So far as the facts of this case are concerned the finding of the learned Chief Justice who tried the action should be accepted as correct, and binding on this Court. In this view it is submitted that the evidence clearly shews that the note indorsed by plaintiff was with others applied when obtained, or at all events before Baechler had any interest in the property, as payment on account of the full indebtedness of Nichol to Barton and Redford, and it fails to shew that that note ever had been used by Nichol, so far as appropriating it as collateral security for the mortgage created by the defendants in favor of Barton and Redford; and no matter which of these conclusions may be considered by this Court to be the correct one, on the evidence there was not any privity shewn between the plaintiff and Baechler. Baechler it is shewn was ignorant of the existence of this note, and therefore could not be an assenting party to its application

\**Present*—HAGARTY, C. J.O., PATTERSON, OSLER, JJ.A., and GALT, J.



as collateral for the mortgage ; and without his consent he could not be made responsible for what might arise out of the action of the other parties, even if it were shewn that they had so appropriated it. The fact of Barton and Redford selling the property held by them, as security for Nichol's debt, to the defendants, and taking back a mortgage for a sum agreed upon, payable two years after, was a giving of time for good consideration, and was such a dealing with the principal as released plaintiff who was a mere surety ; and the plaintiff being thus released was a mere volunteer in making the payment, and cannot now in the absence of request recover even if he were mistaken in his views as to his liability : *Geary v. The Gore Bank*, 5 Gr. 336. Neither can the plaintiff rest his claim on any principle of equity, such as has been sought to be invoked here, by being placed in the position of either Nichol or the original creditors of Nichol as against Baechler. Under any circumstances the plaintiff cannot, as his claim is put in the pleadings, assert any higher rights than Nichol through whom he seeks to claim ; and if he rests his claim on that he must submit to the result of the taking of the accounts between the defendants.

*Moss*, Q.C., for the respondent. The note in question here is clearly shewn to have been accommodation paper and the plaintiff paid \$600 to retire it at maturity ; and Barton always held the note as collateral security ; and Baechler being liable to pay, assumed and agreed to pay the indebtedness for which the note was held by Barton and Redford, and the plaintiff's payment was made after the defendant Baechler had so assumed and agreed to pay such indebtedness, the total of which was then represented by a mortgage signed by both defendants. Besides, it is shewn that the payment made by the plaintiff was applied in reduction of the debt due by Baechler, and he obtained the direct benefit of it, therefore a request by Baechler to make such payment will be implied, from which arises a promise by him to repay. The state of accounts between Nichol and Baechler cannot be material here as Baechler's

indebtedness was reduced by the plaintiff's payment. As to the point urged by the other side that plaintiff had been, by the acts of the parties, released from any liability at the time he retired the note upon which he was accommodation indorser, all that need be said in that connection is, that he retired the note without any notice or knowledge of his having been so released, and what is contended is that he was not released from liability on his indorsation; but however this may be viewed by the court it is certain he cannot be said to have done anything in his own wrong. Under the circumstances here appearing it is submitted that the judgment appealed from should be affirmed and the appeal dismissed with costs.

*O'Neill v. Carter*, 9 U. C. R. 254; *Titus v. Durkee*, 12 C. P. 367; *Bailey v. Griffith*, 40 U. C. R. 418; *Shepley v. Hurd*, 3 A. R. 549; *Austin v. Gibson*, 4 A. R. 316; *Canadian Bank of Commerce v. Green*, 45 U. C. R. 1; *Molsons Bank v. Girdlestone*, 44 U. C. R. 55; *Ferris v. Kingston*, 12 U. C. R. 436; *Hall v. Gilmour*, 9 U. C. R. 492; *Aldrich v. Cooper*, 2 W. & T. L. C. 82; *Quay v. Sculthorpe*, 16 Gr. 449, were amongst other cases referred to.

October 25, 1887. HAGARTY, C. J. O.—I am wholly unable to see how the plaintiff's claim ever assumed the character of a partnership debt.

The appellant cannot, on the evidence, be shewn to have any knowledge whatever of the plaintiff having indorsed a note to accommodate Nichol. In fact, it is admitted that he knew nothing of it. His connection with Nichol only began on his becoming his partner, and giving with him a mortgage to Barton and Redford, for a named sum.

It seems that the latter agreed to reduce the amount of their whole claim by \$1,000 less than their claim against Nichol.

When the new partnership was formed Barton and Redford held this note, with one or two other notes which Nichol handed over to them a year before, payable at long dates, but there is no direct proof whether, in making the reduc-

tion, these notes were taken into account. Whether they were so taken or not does not alter my view of the nature of the transaction.

At the trial plaintiff's counsel reiterated the argument that when the new mortgage was taken from defendants, Barton and Redford held this note as collateral to, or security for, that mortgage.

Mr. Purdom: "The whole point rests, I think, in that they held the note as collateral security for the payment of the mortgage" (p. 12).

Again: "Purdom was a surety; he paid the note, and it was applied in payment of the mortgage" (p. 14),

Again, at p. 17. The case seems rested on this assumption throughout.

I do not see that plaintiff ever was in the position of a surety for the payment of this mortgage. The note was given by him solely to help his relative Nichol, a year before Baechler had any interest in the business, and he admits that Nichol could have used the note as he pleased.

I understand from Mr. Macpherson's evidence that he received this indorsed note from Nichol, on behalf of Barton and Redford, a year before Baechler came in, and a week or two after its date. He says they were received, "whether as collateral I cannot recollect at all, or whether as payment I cannot recollect. They remained in my safe till after the mortgage was taken."

I am not prepared to hold that Baechler, by executing the two instruments of 15th January, 1881, and by what is stated therein, became thereby liable to pay this note to plaintiff.

It is quite true that credit is given, in arriving at the balance due on the mortgage by him and Nichol, for the amount paid by plaintiff on the note. The mortgagors have chosen to credit this amount as paid. They say that "certain amounts have been received on account of the said mortgage debt," and that a named balance was then due, "after giving credit for all moneys received on account of the said mortgage," and Baechler covenants to pay that balance.

Now the giving of these credits was the work of the mortgagees. All moneys or assets received from or through Nichol, apart from the firm, would be applicable, in their view, to reduce the whole claim. Could Barton and Redford, or their assignees, by crediting this sum, alter the original position of the appellant, and create a privity and liability between him and the plaintiff which otherwise did not exist?

I see no action of the appellant, outside the effect of his signing the original mortgage, to create such liability.

Mr. Macpherson says that when he signed this agreement of 1881, he was insolvent—that “he never examined the agreement, and took my figures for it in signing.”

It seems from the account—shewing how it stood on Baechler and Nichol’s mortgage, that the notes of Purdom, Morrison, and Ballantyne are credited at \$620 each, in all \$1,840, and are divided in the proportions respectively for Redford, and in Barton’s account respectively in the proportion of \$982 and \$858.

These three notes are those which Nichol got from his friends to help himself a year before Baechler had any connection with his business,

It is said that Barton and Redford struck off \$1,000 from their claim against Nichol when the appellant joined him. Their joint mortgage was for \$6,323. An account shews the whole claim at \$7,323. That by itself shews a \$1,000 reduction. But at the foot of the same account under date 14th April, 1875, (a year before) there is a credit.

|                            |            |
|----------------------------|------------|
| April 14, 1875. Notes..... | \$1,500 00 |
| Interest.....              | 120 00     |

---

\$1,620 00

And this credit is deducted from the

|                        |            |
|------------------------|------------|
| whole claim thus ..... | \$7,323 08 |
|                        | 1,620 00   |

---

\$5,703 08

If this credit was made and given at the time, it would apparently shew that three notes were taken into consider-



ation in the accounts. But the balance thus shewn is over \$600 less than the sum for which the mortgage was taken.

If they took these three notes into account and credited them, and then took the joint mortgage for the unpaid or unsecured balance, it seems impossible to consider that Baechler ever had anything to do with their payment.

There is no doubt but that Nichol gave over this note and the two others for the benefit of Barton and Redford, and yet the amount of claims for which Baechler joined in covenanting to pay when he joined Nichol, would be quite independent of these notes.

We cannot decide this case on the principle that it is all the same to the appellant whether he has to pay plaintiff or his original mortgagees.

My brother Patterson has pointed out the essential difference it makes whether he is held directly liable to and in privity with plaintiff, or only through Nichol.

If Baechler's defence here succeeds, it may be that Barton and Redford's assignees may have their settlement with him rectified as to crediting him with this payment by plaintiff, and he would still be held liable to them to that additional extent.

I think this claim never was a partnership debt, or one for which the appellant was ever liable to the plaintiff. I think the main position of plaintiff, that this note was held as collateral security for the mortgage, was not proved; and that the whole case seems rested on the assumption that the notes were held as collateral to the mortgage. There is no conflict of evidence here. The Court below viewed the case differently from the trial Judge, and have drawn a different inference from the uncontradicted testimony.

I am unable to draw the same inference. I find no proof of the main position, that the notes were held as collateral to the joint mortgage.

If deciding the case as a juror, on the evidence of Macpherson and of the accounts, I find that these notes were treated by the two creditors as assets received from Nichol, and forming, most probably, their inducement to throw off the \$1,000 on Baechler joining.

That it never became a partnership debt, or really, when paid, a partnership asset.

That the fact of the creditors giving credit for this note in their settlement with Baechler, on the evidence before us, ought not to be accepted as by itself creating a privity with and liability to the plaintiff which never previously existed.

My brother Osler has pointed out another aspect of the case, as to the effect of the arrangements between the parties having the legal effect of discharging the plaintiff as indorser, which is well worthy of serious consideration, although I do not rest my judgment upon it.

PATTERSON, J. A.—Nichol being pressed by Redford and Barton, to whom he owed upwards of \$7,000, procured the plaintiff and two other friends each to indorse for his accommodation a promissory note, made by Nichol, for \$500, payable in four years after date.

The plaintiff was not aware, as he says, of the use to be made by Nichol of the note, but gave the note to Nichol to use as he thought fit.

It does not appear that the plaintiff ever knew, and he was not asked if he knew what Nichol did with the note. What he did was to hand it, with the other two notes, to the solicitor for Redford and Barton, and the solicitor held the note till it matured, when the plaintiff paid the amount and the solicitor received it for Redford and Barton.

The right of the plaintiff to recover the amount he paid from Nichol is not disputed. But he seeks to recover it from the defendant Baechler, who is no party to the note as money paid to the use of Baechler.

The right is asserted as the result of transactions to which the plaintiff was not privy, and of which he is not shewn to have had any knowledge.

Redford and Barton held as security from Nichol some land, under a conveyance absolute in form but in reality given as a mortgage.

Baechler, after the note which the plaintiff indorsed had been held for some time for Redford and Barton, formed

a partnership with Nichol, and to facilitate that arrangement Redford and Barton conveyed the land to Nichol and Baechler for the nominal consideration of \$6,323.08, being the amount of Nichol's debt at the date, less \$1,000 which they were content to forego, and they took a joint mortgage from Nichol and Baechler of the \$6,323.08 in two years.

The notes were not taken into account in making up the amount due by Nichol.

After a couple of years, Nichol and Baechler dissolved partnership and Baechler undertook to pay all the partnership debts. This was before the maturity of the note.

At a later date, and after the notes had been paid by the indorsers to the solicitor for Redford and Barton, there was a transaction between Baechler and Redford and Barton or their representatives, concerning the land, and deeds were executed by Baechler in which the balance of the mortgage debt was stated at the sum shewn after crediting the amounts of the notes.

The plaintiff's claim against Baechler is asserted on the ground that he paid his money as surety for the debt for which Baechler was liable, and that Baechler received the benefit of the payment by the credit given for it on the mortgage debt.

If all parties were solvent it would make little or no difference to the plaintiff whether he paid as surety for Nichol alone, or for Nichol and Baechler jointly; and the fact being that, as between those persons, Baechler had become liable to pay the whole mortgage debt, giving Nichol a remedy against him for anything he might have to pay, it might at first sight seem that the plaintiff, if he paid on Nichol's account, would have a remedy equivalent to that which he now seeks, by subrogation to Nichol's rights against Baechler. But in that case the state of accounts between the former partners becomes important, and it is said to be so much in favor of Baechler as to make it of consequence to him to resist the charge of direct liability to the plaintiff.

The note was not completely indorsed by the plaintiff till it was delivered to an indorsee. When he wrote his name on it and handed it to Nichol he made Nichol his agent to complete the indorsement by delivering the note to whomsoever he pleased, and Nichol delivered it to Redford and Barton. That delivery was, in legal effect, the act of the plaintiff, who thus indorsed the note to Redford and Barton as security for Nichol's debt to them. Nothing whatever was done with the note from that time until it matured, either by the plaintiff or by any one acting or professing to act for him.

It is scarcely contended that Nichol's debt was ever paid to Redford and Barton.

It is not impossible, and it would probably be no violent treatment of the facts, to hold that those creditors had taken Nichol's land in satisfaction of the debt, and had then resold the land to Nichol and Baechler. They put their dealing very much in that form. But the real transaction was the change in the form of the debt itself by voluntarily reducing the amount and taking further security by the joint covenant of the partners, the land remaining charged with the debt, or being charged with the whole if not previously charged with the whole amount. Nichol was still debtor for the whole amount covenanted to be paid, although Baechler also became a debtor for it. As I have mentioned, the note was not taken into account in connection with the mortgage, and Baechler knew nothing of the note till called on by the plaintiff to reimburse what he paid to retire it at maturity. Nor is the plaintiff shewn to have had any knowledge of the arrangements with Baechler, or even to have known what Nichol had done with his note. We may have our own ideas of the improbability of complete ignorance of these things on the part of the plaintiff, but the evidence leaves the matter as I have put it.

There are very strong reasons for thinking that the plaintiff ceased to be liable to Redford and Barton as soon as they made the new arrangement with Nichol. He,



however, did not assert his discharge, but paid the note, and I, therefore, base my opinion upon this appeal, on the other facts of the case.

Under the circumstances to which I have adverted, it seems to me that the plaintiff paid his money to the use of Nichol and not to the use of Baechler.

It is true that Baechler received the benefit of the payment as payment of so much of the mortgage debt, but he did so in the sense of its being a payment by Nichol who was jointly liable with him to the creditors, and whom he was bound under his deed of dissolution to indemnify; and the plaintiff's recourse to Baechler would seem to be by way of subrogation to the rights of Nichol.

That differs materially in its practical effect from a claim for money paid to the use of Baechler, which would be unaffected by the state of accounts between Baechler and Nichol.

The action was framed as an action against Baechler on the note, but it is not now contended that it can be maintained in that form. In the Divisional Court it was thought that it could be maintained for money paid; but that contention failing, as I think it must do, the result is to restore the judgment entered by Cameron, C. J., at the trial, dismissing the action.

In my opinion, therefore, the appeal should be allowed.

OSLER, J. A.—The defendant Nichol being indebted to Redford and Barton, who had placed their claims in the hands of one Macpherson, a solicitor, for collection, and being required by him to pay or give security for part of the debts, procured the plaintiff to indorse for his accommodation a promissory note for \$500, dated 14th April, 1875, payable four years after date, with interest at eight per cent. About the 1st May, 1875, he delivered it to Macpherson as collateral security for the debts Nichol owed them, and they then became the holders thereof. At this time Redford held, also as collateral security, Nichol's mortgage to him, dated 19th January, 1872, on certain land in Stratford,

the subject of the subsequent dealings hereafter referred to, for \$1,000, and Redford and Barton held for the same purpose a conveyance of the equity of redemption, dated 12th April, 1873, absolute in form, but in reality merely a second mortgage.

Matters remained in this state until April, 1876, when Nichol and the defendant Baechler contemplated entering into partnership and acquiring the land as partnership property. A statement was prepared shewing Nichol's indebtedness, by which it appeared that he owed

|                                    |           |
|------------------------------------|-----------|
| Barton.....                        | \$3803 48 |
| Redford .....                      | 3377 00   |
| Besides insurance and advertising. | 142 60    |
|                                    | <hr/>     |
| Total .....                        | \$7323 08 |

They threw off \$1,000 from this sum in order to induce Baechler to purchase the property with Nichol, and to assume liability with him for the balance of the debt, and then by deed of the 4th April, 1876, for the expressed consideration of \$6,323, conveyed the land to Nichol and Baechler, who, on the same day re-conveyed it by way of mortgage to the grantors for the same amount, which they thereby covenanted to pay in two years from date, with interest at eight per cent. yearly. At the same time the mortgage of the 19th January, 1872, was discharged, and Redford and Barton executed a memorandum declaring their respective interests in the mortgage debt to be—

|              |            |
|--------------|------------|
| Redford..... | \$2,948 30 |
| Barton ..... | 3,374 70   |
|              | <hr/>      |
|              | \$6,323 00 |

There is no evidence that the note in question, or either of two other notes which Nichol had also given to Macpherson, were spoken of or noticed in connection with this transaction. Macpherson said:

“I cannot recollect anything being said about it at all. I do not think Baechler knew anything about the note;

as far as I know he had no knowledge of it. I know my idea was in taking Baechler's covenant we would have the additional security of (it)."

Nichol and Baechler entered into partnership on the 1st May, 1876, and so continued until the 9th January, 1877.

On the 24th February, 1877, they executed a deed of dissolution, by which Baechler agreed to allow Nichol \$600 in full of all his interest in the profits of the business and assets of the firm, but Nichol was to be charged with all moneys in excess of that sum which he had drawn for his private purposes, and of debts for which he might have rendered the firm liable, and he agreed to account for, and to pay over such excess to Baechler, and to indemnify him against such debts.

Baechler agreed to assume and pay the debts for which the firm was legally responsible.

On the same day Nichol conveyed to Baechler his interest in the equity of redemption in the lands mortgaged to Redford and Barton, and the other freehold property of the firm.

On the 15th July, 1878, Baechler by deed, reciting the mortgage of the 4th April, and that a large sum was due thereon for principal and interest, and that he had agreed to release the equity of redemption to the mortgagees, in consideration of the premises and of \$100, granted and released to Barton and one Hossie, who was Redford's assignee in insolvency, the lands covered by the mortgage.

We have no evidence of anything that occurred on this occasion to shew that the parties intended to keep the mortgage debt alive, or to rebut the ordinary presumption that as against the mortgagors it was satisfied by their taking a release of the equity of redemption, though the subsequent conduct of the parties may lead to the inference that this was not intended.

On the 17th April, 1879, the plaintiff's note became due, and on the 10th May he paid \$600 to Barton and Hossie in discharge of it.

Nearly two years afterwards, viz., on the 15th January, 1881, by deed reciting inter alia the mortgage of the 4th

April, 1879, that Barton and Hossie had agreed with one B. F. Youngs to sell the land comprised therein, and that Baechler had become a party to express his assent to the sale, and had agreed to pay Barton and Hossie any balance that might be due, after crediting the purchase money, Barton and Hossie granted the land to Youngs.

On the same day Baechler executed separate agreements of the same tenor and effect with Barton and Hossie, reciting the mortgage of the 4th April, the assignment of Nichol's interest in the land to Baechler, and that he had agreed to assume payment of the mortgage money and interest; reciting also the sale to Youngs, and that after giving credit for the purchase money there remained due on the mortgage \$5,118, of which as between them Barton was entitled to \$2,139.75, and Hossie to \$2,978.25. Baechler then agreed to pay Hossie the latter [and] Barton the former sum in one year, with interest from date. Statements were at the same time prepared by Macpherson of the mortgage account as between mortgagor and mortgagee, and as between the mortgagees themselves. In the former credit is given for the amount paid by the plaintiff on his note, and the others shew the proportions in which it was divided between the mortgagees.

The plaintiff now seeks to recover the money thus paid by him; either on the ground that it was paid on a note held by Barton and Redford as security for certain debts of Nichol which afterwards became the joint debt of Nichol and Baechler, but which at a still later period Baechler, as between Nichol and himself, became bound to pay, and therefore that the plaintiff is entitled to be subrogated to Nichol's position; or on the ground that the note, indorsed as it was for Nichol's accommodation, was delivered by him to Barton and Redford directly as security on account of the joint debt which Nichol and Baechler owed them on the mortgage, and that he has paid them as holders the amount thereof.

The judgment appealed from proceeds upon the latter ground which presents the simple case of an accommoda-



tion note given by one partner being delivered by him, and afterwards paid to a creditor of the firm in the ordinary course of business.

Assuming that the creditor took the note *bonâ fide* without notice of any defect in the *power* of the one partner to use it as security for the debt of the firm, it could hardly be contended that the accommodation maker or indorser could not recover the amount from the firm as money paid at their request.

There is, however, great difficulty in inferring from the evidence that the note in question ever was delivered or agreed to be left as security for the new mortgage debt. It is distinctly opposed to the evidence of Macpherson, the only witness who speaks of the transaction, and it is clear that Baechler knew nothing of the existence of the note. I think the only admissible inference is, that, except so far as the transaction of the 4th April may have altered their position, Barton and Redford remained the holders of the note on the terms on which they received it from Nichol, viz., as security for Nichol's debts to them. But in the absence of a distinct agreement on the subject, it would by no means follow as a matter of course that when the character of these debts was changed, the securities which the creditors held for them would remain unaffected, and continue to be collateral to the debts in their altered form. The strong inclination of my opinion is, that the effect of the transaction of the 4th April was to discharge the plaintiff as surety for Nichol upon this note. It operated as a complete novation of Nichol's debts to Barton and Redford, as collateral to which the note had been given, by the creation of a new debt, viz., one joint debt of Nichol and Baechler, evidenced by the mortgage, to persons who had theretofore been separate creditors of Nichol alone. All the circumstances point to the conclusion that this new debt was accepted in substitution for and in satisfaction of the former debts, on the extinguishment of which the plaintiff's liability on the note which had served its purpose, would be at an end, in the absence of

any express agreement that it should continue as security for the new debt, or of a re-delivery of it by Nichol, equivalent to his again putting it into circulation. for that purpose. In this view the payment by the plaintiff was a purely voluntary one as regards the defendant Baechler, made without his privity, or any express or implied direction by him, and therefore would form no ground to maintain this action.

If on the other hand Nichol's debts to Barton and Redford were not extinguished by the mortgage, and they still held the note on the terms on which they originally received it, the plaintiff could have no higher right against Baechler (between whom and himself there was no privity of contract) than to be subrogated to the rights of his principal Nichol, under the deed of dissolution of partnership. True, that by this deed Baechler covenanted to pay the debts of the firm (in which the mortgage debt must have been included) but paramount to that is his right to have the account of the partnership taken, and to shew, as he alleges that he can shew, that his claim against Nichol under the latter's covenant in the same deed exceeds the debt which he covenanted to pay. I think it not improbable that the facts, which are very meagrely and confusedly brought out, are susceptible of the explanation that the notes given by Nichol to Macpherson were retained as the equivalent of or as security for the \$1,000 which Barton and Redford threw off their debt to induce Baechler to join with Nichol in the purchase and mortgage of the 4th April. But in that case, it is needless to say, that the plaintiff would have no recourse against the former.

I think the action cannot be maintained on either of the grounds on which it has been rested, and therefore that the judgment at the trial should be restored.

GALT, J., concurred.

*Appeal allowed, with costs.*

## MITCHELL V. CITY OF LONDON ASSURANCE COMPANY.

*Fire Insurance—Policy of Insurance not under seal—Loss payable to another—Right to sue—Condition.*

M., the plaintiff, held a mortgage on a steam tug owned by one G., who by arrangement with plaintiff, effected an insurance thereon for one year, the policy issued for which was not under seal and declared that "loss, if any, payable to M. as his interest may appear," and further that the company were liable to pay to the insured and also to his assigns, if the policy should be assigned with the consent of the company, but not otherwise, all loss or damage, &c. The local agent of the company knew plaintiff was mortgagee, handed him the policy, and notified him of the time of its expiry near the close of the year, whereupon plaintiff paid the renewal premium for a year and took a receipt therefor in the name of G. signed by the general agent.

During the currency of that year the tug was burned and the company refusing to pay plaintiff the insurance, he sued therefor in his own name. The Queen's Bench Division held the action was properly constituted, and gave judgment in favor of plaintiff. On appeal that judgment was affirmed with costs, on the ground that the relation of trustee and certui que trust had been created between G. and the plaintiff in respect of the policy moneys, [BURTON, J. A., dissenting].

One of the conditions of the policy was, that the company should not be liable for any loss occurring while petroleum, rock, earth, or coal oil, burning fluid, naphtha or any liquid product thereof or any of their constituent parts were stored or kept on the property insured.

Held, [affirming the judgment of the Court below], that the fact of there being a small quantity—about a gallon in two small cans—of lubricating oil, used for the purpose of lubricating the engine, was not such a storing of oil, &c., as was contemplated by the condition.

THIS was an appeal by the defendants from the Judgment of the Q. B. D. (reported 12 O. R. 706), and came on for hearing before this Court on the 9th and 12th of March, 1888.\*

*Robinson, Q. C., and C. Millar, for the appellants.*

*W. R. Meredith, Q. C., and J. S. Fraser, for respondents.*  
The facts giving rise to the action, the points raised and authorities cited are fully stated in the report in the Court below, and in the present judgments.

April 9, 1888. HAGARTY, C. J. O.—We are of opinion that we must take the record as we find it, with Mitchell as the only plaintiff. Every opportunity has been offered down to the argument before us to make the amendment, but it has never been made.

\*Present—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

We have therefore to dispose of the main point. Can the present plaintiff maintain the action ?

The policy is not under seal ; it is merely executed by the company's agent under power of attorney. The application is made by Gurd for insurance for \$2,800. Loss, if any, payable to George Mitchell, as his interest may appear.

The policy recites the application, that Gurd has paid the premium for insuring against loss or damage by fire, loss (if any) payable to George Mitchell, as his interest may appear ; and it declares the company liable to pay to the said insured, and also to his assigns if the policy shall be assigned with the consent of the company, but not otherwise, all such loss or damage, &c. It was for one year, from 20th June, 1883, to 20th June, 1884.

This policy, after execution in Toronto, was sent to Gillard, the local agent, and by him handed to plaintiff by Gurd's direction. He knew plaintiff was mortgagee. He notified plaintiff when the year was nearly up, and plaintiff came and renewed it, paying the premium, and taking receipt. The receipt is dated June 24, 1884, in the name of Gurd, signed by the general agent.

Sometime in September, and long before the loss, the plaintiff came to Gillard's office, and shewed him the policy and a mistake in the name of the tug, and he asked Gillard if he could get a policy direct to himself. Gillard wrote to the head office, September 6th, saying that Mitchell, in whose favour the boat was insured, wished the mistake corrected, and that he would like the policy issued to him direct as mortgagee. Gillard adds that the boat had changed ownership since the policy was issued, and is now held in the name of Charles J. Johnston, but Dr. Mitchell is still mortgagee, and that the agent and the doctor would be obliged by the company issuing the policy as requested, that is, to him as mortgagee.

The answer, September 9th, from the head office, expresses regret that they cannot issue a policy to Mitchell as mortgagee, as they don't issue them in that way, and proceeds :



"I have filled in the assignment blank on the back of the policy and return to you for Mr. Gurd's signature, which please secure and return to this office for our consent."

Gillard handed the policy to plaintiff to get Gurd's signature, which he did, and brought it back executed to Gillard.

On the 2nd October, Gillard sent it to the head office to have consent attached.

4th October. Letter from head office acknowledging receipt of policy for consent to assignment—"kindly forward endorsement fee."

On 7th October, the general agent writes :

"I am in receipt of your favor of the 6th inst., with 55 cents enclosed as fee for consent to assignment of Gurd to Johnson, but to which we are not prepared to give our consent. It appears that by a former letter the mortgagee stated that the insurance was for his benefit only, and asked for a policy in his own name as mortgagee. This, in my absence, was refused, and the matter only now comes before me on my return, and in connection with your letter regarding this endorsement. The policy should be in the name of the mortgagee only, and although the amount of insurance is much larger than his interest, still, we have no objection, and I have given instructions to issue a new policy for one year from the original date of issue. I therefore return the 55 cents for endorsement fee, as it is not chargeable."

On 8th October, he writes again that after he had written the last letter he had received Gillard's telegram that the tug was burned, adding that he had written fully as to insurance in name of George Mitchell as mortgagee, and "regret to learn we shall suffer a loss in the tug."

Then follows the correspondence set out very fully in the report of the case below, and which need not here be repeated.

In his letter of the 11th October, he notices that the insurance, as Gillard stated, had been kept in force for the mortgagee's benefit.

On 17th October, he acknowledges plaintiff's notice of loss, and adds : "My own impression is that you are the only person interested or any way concerned."

On 22nd October, he sends up to Gillard: "Policy direct to plaintiff as requested in September; not to be delivered to plaintiff till he gives up the renewal receipt."

The plaintiff stated that he was advised not to accept this policy as being issued after the loss, and not binding.

The general agent writes again on 30th October, regretting that plaintiff had taken the position he did, as he could not recover on the original policy, and that the company had not assented to the transfer of Gurd to Johnston. There is also a correspondence with plaintiff's solicitors. On November 14th, they ask for copy of policy. But it does not seem that defendants ever gave it, and in February the local agent is instructed to return policy in his possession.

The action was commenced on the 19th February, 1885. It was eight days after this the agent wrote the long letter to plaintiff pointing out deficiencies in the proofs, and objecting to any claim made by any person other than the assured.

The learned Chief Justice of the Queen's Bench Division has elaborately stated all the facts and correspondence as to the proof of loss. The defendants, after going the length of sending up a policy direct to the plaintiff as mortgagee, and with the fullest notice of his interest under the original policy, and stating in their letter of 17th October, after the loss, that they considered him "the only one interested, or in any way concerned," took the position that he was not a party insured (31st October), and that he could make no claim, and the company could have no dealings with him.

The plaintiff sent in his proof and claim dated 29th October. On the preceding 22nd October, the solicitors wrote to defendants that Johnston was the owner.

On the 12th November, a formal claim is made by Johnston verified by affidavit, and is sent to defendants on 17th November.

On the 24th November, defendants again urge that they object to proof or claim being made by any other persons than the assured, and demand any more particulars.

On the 26th January, the solicitors send magistrate's certificate.

They had previously, 14th November, asked for the copy of the policy, stating the defendants' inspector had promised to give it. The defendants never would furnish it.

I have come to the conclusion that the learned Chief Justice, agreeing with the trial Judge (without a jury), that it is inequitable under the facts in evidence to allow the objections to prevail to the proof papers and claim, and that the proofs furnished ought to be sufficient.

Up to the time of bringing the action, the defendants persistently refused to give up the policy, or a copy of it, and I do not think that in such a case we should yield to the argument that plaintiff could have seen what the statutory condition required.

When an insurance company wrongfully decline producing the contract on which they are sued, I have a strong opinion that they must not be allowed to succeed in defeating a just claim on such objection. Substantial proof of loss, damage, interest, &c., was given, and when a number of objections and demands—some of them futile and useless—are made, grounded on the contents of a document which they refused to produce, I think we should refuse to aid.

As to the objection under the condition that proof must be made by the assured, although the loss be payable to a third party, it may be observed that there may of course be cases where the loss may be payable to a third party—a stranger to the contract, or the subject matter of insurance.

I agree with the Court below that "there is evidence that the company did assent to the transfer to Johnston, and that the assent was not signed on the policy because defendants had known of the fire before the signature was attached."

When plaintiff applied to the agent in September, asking for a policy direct to himself, they had notice of the transfer

to Johnston, and filled up the form of assent and sent it for execution. Then they decline to execute the assent so drawn up, but offer to give plaintiff a direct policy, and actually sent it up after the fire to the agent for him.

It is shewn that if early in September the defendants had at once refused assent to the assignment to Johnston, plaintiff would in good time have protected himself by assurance elsewhere.

Gillard's letter of 6th September, gave them fullest notice of plaintiff's position.

It is impossible to avoid an expression of regret that a claim so just and well founded as that of the plaintiff, should have been defended on the ground and in the manner disclosed in the evidence.

If the property in this tug was never, in fact, legally vested in Johnston, the objections as to consent will fail. If it so vested, then we hold the assent to the transfer of policy is sufficiently shewn, and Johnston has made a formal claim.

The effect, or rather the failure of effect of a wholly collusive and unreal proceeding, however clothed in the garb of a judgment of a Court of record, is fully considered in such cases as *Girdlestone v. Brighton Aquarium Co.*, 4 Ex. D. 107; *Lord Bandon v. Becher*, 3 Cl. & F. 510; and in our case of *Magurn v. Magurn*, 11 A. R. 181.

The proceedings in the Maritime Court at Sarnia might be best described in the phrase there cited from the *Duchess of Kingston's Case*;

“Fabula, non iudicium, hoc est; in scena, non in foro, res agitur.”

I think that defendants have the right to object to any breach of conditions, such as to coal oil, gunpowder, &c.

The evidence shews that there was a small quantity: “Two small cans of black lubricating oil, maybe about a gallon,” on board the tug.

My brother Armour points out how the defence is pleaded, certainly not in the words of the condition. But even if the objection be correctly taken it amounts to this; that



about a gallon of this oil was on board the boat for the necessary purpose of lubricating the engine. The defendants insured this vessel as a steam vessel, and we must assume a universal knowledge that lubricating oil must be used. If the defendants be right, then the presence of a small vial of this oil vitiates the insurance.

The Legislature made this provision excluding the storing or keeping of petroleum, rock, earth, or coal oil; camphine, burning fluid, benzine, naphtha, or any liquid products thereof, or of any of their constituent parts, or more than a given quantity of gunpowder should be stored or kept on the premises. They named a number of products considered dangerous, but allowed refined coal oil for lighting purposes only up to five gallons. This we may assume to be a concession in favor of the well known, almost universal, use of this oil for giving light. It is at least as dangerous as the other articles.

I cannot believe these words can be applied to a lubricating oil necessarily used for machinery where machinery or a boat propelled thereby, is the subject matter of the insurance. It is not "stored or kept," in the apparent meaning of the words which seem to point to a different matter such as the dealing in such articles, or having a storehouse therefor.

It is singular that the same clause should allow the presence of twenty-five pounds of gunpowder, and should exclude the presence of a gallon of oil for lubricating the insured machinery.

No person insuring a steam vessel against fire, would think of obtaining express permission to keep enough oil to lubricate the machinery, nor would, except after taking legal counsel, construe this clause in the statutory conditions as prohibiting its use. My brother Osler has pointed out another reason for this view.

A very important question is raised as to the right of plaintiff as mortgagee to sue on the ground of want of privity: *Angell on Insurance*,

Sec. 60 "As the doctrine that if a person makes a promise for the benefit of a third person the latter may sue

upon it in his own name is the appropriate doctrine of the contract of insurance, if a mortgagor procures insurance in his own name, but with a stipulation that the amount of the loss, if any, shall be paid to the mortgagee, a suit on the policy may be maintained in the name of the mortgagee, the fact of bringing such suit ratifies the act of procuring insurance for his benefit." Citing *Motley v. Manufacturing Co.*, 29 Maine 337.

*May on Insurance*, sec. 446. If the policy is made payable in case of loss to a third party, he may sue : citing same case. *Ennis v. Harmony Ins. Co.*, 3 Bos. 519, N. Y. Sup. Ct.

The defendants rely on the language of Mr. Justice Gwynne, in *McQueen v. Phoenix Co.*, 4 S. C. R. 660, at page 703, as to the plaintiff there being the right person to sue as the party with whom the company covenanted, though the loss was payable to others. It was a policy under seal.

In the same Court, *Caldwell v. Stadacona Co.*, 11 S. C. R. 212, the covenantee was plaintiff, the loss, if any, payable to G. R. Anderson. It was objected that Anderson should be the plaintiff.

Mr. Justice Strong, p. 235, notices the objection, and says, that the covenant is under seal, and the old and well known rule is therefore exactly applicable, that if a person covenants with another to pay money to a third person not a party to the covenant, the covenantee alone can sue, and the person to whom the money is payable being a stranger to the covenant, can maintain no action.

"It is true (he says), there are some American authorities, where the policy is not under seal, which have recognized a right of action in the person to whom the loss is payable, but these have proceeded upon the principle, inapplicable here, that the person to whom payment is appointed to be made, is to be considered a party to the contract."

Mr. Justice Gwynne, p. 251, refers to *McQueen v. Phoenix Co.*, and repeats that the covenantee was the proper person to sue. He notices *Brush v. Aetna Ins. Co.*, 11 Old. 459, from Nova Scotia, where it was held in an action of assumpsit on a policy not under seal with a provision :

"Loss, if any, payable to the order of Peter Brush, his interest therein being as mortgagee, and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of Brush." The latter was held entitled to recover.

Mr. Justice Gwynne adds :

"Whether or not we should concur in that decision, if the precise point before the Court should arise, it was not necessary to express any opinion."

This case of *Brush v. Aetna Ins. Co.*, is very well discussed by the Nova Scotia Supreme Court. It was in 1865, an action at law. It contains a very full review of the authorities down to date, especially the American cases and text writers, and was decided in favor of the mortgagee's right to sue. As to actions at law, we have little, if any decisions as to a mortgagee's right. After our Administration of Justice Act, and before the Judicature Act, there is a decision of Harrison, C. J., on demurrer.

*Bank of Hamilton v. Western Assurance Co.*, 38 U. C. R. 609. Declaration. Defendants agreed to insure J. S. on wheat and flour owned by him, amount of loss, if any, to be paid by defendants to plaintiffs. Policy delivered by defendants to the bank, and thence and up to loss, bank was interested.

It is not stated whether the policy was or was not under seal.

Held, that the bank could sue.

We have to deal with it now, if necessary, as an equity suit, and it appears to me that the present plaintiff has the right to maintain this suit.

There was no covenant to insure in the mortgage to plaintiff, and the effect of such a covenant is pointed out in many of the cases. See *Greet v. Citizen's Ins. Co.*, 27 Gr 121 ; 5 A. R. 550 ; *Watt v. Gore District* 8 Gr. 530.

There is evidence from which it may clearly be inferred, that the insurance was effected by agreement between the mortgagor and mortgagee, and was on execution handed to plaintiff by the company by the mortgagor's direction.

The general rule is laid down in *Gandy v. Gandy*, 30 Ch. D. 57. Cotton, L. J., after noticing the rule, that a person not a party to the contract cannot sue, says :

“That rule, however, is subject to this exception : if the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as cestui que trust under that contract; then B. would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way the law may be stated.”

*Touche v. Metropolitan Railway Co.*, before Lord Hatherley, is discussed, and Sir George Jessel, in commenting on it, in *Re Empress Engineering Co.*, 16 Ch. D. 127, says :

“A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement the next day, releasing the old one. If C. were a cestui que trust, it would have that effect. I am far from saying that there may not be agreements which may make C. a cestui que trust. There may be an agreement like that in *Gregory v. Williams*, 3 Mer. 582, where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So again it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person.”

I think the case before us falls within the rule allowing the third party to sue.

*Tweddle v. Atkinson*, 1 B. & S. 393, reviews some of the older cases. No stranger to the consideration can sue on a contract though made for his benefit.

There is a very full discussion of the general rule in *In Re Flavell*, 25 Ch. D. 89. Mr. Justice North's judgment is very full, and was upheld in appeal by the Lords Justices. A large number of the authorities are discussed. The general doctrine is noticed in several of the cases there cited. I refer also to Mr. Justice Strong's judgment in *Mulholland v. Merriam*, 19 Gr. 288.

That a covenant to insure has been treated as entitling the mortgagee to sue is fully recognised in such cases as



*Greet v. Citizen's Ins. Co.*, 27 Gr. 121. and in this Court, 5 A. R. 599. See also *Livingstone v. Western Assurance Co.*, 14 Gr. 461, and on Appeal 16 Gr. 9.

Then, in the application plaintiff is stated to be the incumbrancer and mortgagee on the tug; and he is to receive the loss according to his interest, and on this information and understanding the defendants enter into the contract. The plaintiff is directly interested in the subject matter of the insurance—in fact the legal owner under his mortgage—and has thus a direct beneficial interest in the matter. In my judgment all this makes his case just as strong as if he had the direct covenant to insure.

Gillard swears that he was aware that plaintiff was mortgagee, and that he understood the policy was issued at the instance of both parties, and he was told to deliver it when received from the head office to plaintiff. Gillard wrote out the application.

The plaintiff was examined by defendants before trial. His examination is printed in the appeal book, but does not seem to have been used at the trial. There does not appear to be any doubt, but that it was under agreement between Gurd and the plaintiff that this insurance was effected.

If the case required it to support plaintiff's claim, I would consider it right to take evidence on this point. No one at the trial seems to have thought it necessary to ask the question directly.

In *Livingstone v. Western Assurance Co.*, Spragge, and Mowat, V.CC., held that the mortgagee to whom the money was to be paid could sue, and that he was a party to the insurance, and was not to be barred by a breach of condition by mortgagor, in whose name the policy was effected. VanKoughnet, C., dissented, and in the Court of Appeal it was held that the Chancellor's view was correct, and that the mortgagor's breach was a bar. We all assent to that view.

The utmost the mortgagee could ask is, that as soon as the loss has occurred, and the claim to the insurance money

justly due on the conditions of the contract, is, that as provided by that contract he has a right to the money.

I do not see how he can be debarred from the right to demand the intervention of a Court of Equity to enforce his claim to the money.

In a case where possibly the mortgagor—the legal plaintiff was refusing or omitting to enforce the claim, or colluding with the underwriters, I can see no reason why he should not proceed by bill making the former a defendant with the company. If he could do so why is he now to be treated as a stranger to the contract?

I am of opinion the case comes within the rule laid down by Cotton, L. J., that “where the contract, although in form with A. is intended to secure a benefit to B., so that B. can say he has a beneficial right as *cestui que trust* under that contract; then B. will be allowed to insist upon and enforce it.”

Here, as soon as all things have been done to make defendants liable to pay the amount of the insurance money to which the mortgagee's interest entitles him, then the money is stamped with a trust in favour of plaintiff.

We are not embarrassed by any technical rule as to the covenantee in a sealed instrument. Reading the application and policy together, as it is provided they are to be read, may the bargain be not thus stated?

Gurd proposes they shall insure a tug, of which Mitchell is the legal owner, to the extent of his mortgage; if any loss occur it is to be paid to Mitchell to that extent. The defendants accept this proposal, and bind themselves accordingly. This is proved to be done by arrangement between Gurd and the plaintiff.

I think the legal effect is to give plaintiff a direct beneficial interest and a lien on the insurance money to the extent of his interest when the money in defendants' hands becomes applicable to the payment of the loss, and that he can file a bill to enforce such lien.

OSLER, J. A.—The objections substantially relied upon are :

1. That Mitchell cannot sue in his own name.
2. That the property insured was assigned to Johnston without the written permission of the company indorsed upon the policy by an authorized agent of the company as required by the 4th statutory condition ; and
3. That under condition 10, item (*f*), the company are not liable for the loss, because it occurred while certain inflammable substances mentioned in that condition, were stored or kept in the building insured without the written permission of the company.

It is well settled that in a policy, by the terms of which the mortgagor is the party insured and with whom the company contract, a clause by which the policy moneys are made payable to the mortgagee in the event of loss, does not create an insurance of his interest so as to enable him to recover upon the policy qua an insurance contract with him, but is a mere appointment of the mortgagee to receive any moneys which may become due from the insurers in the event of loss, and a direction and authority to the latter to pay him instead of the mortgagor : *Grosvenor v. Atlantic Ins. Co.*, 17 N.Y. 31 ; *Continental Ins. Co. v. Cox*, 92 Ill. 145 ; *Franklin Savings Co. v. Central Fire Ins. Co.*, 119 Mass. 240 ; *Brunswick Savings Co. v. Commercial Union Ins. Co.*, 68 Me. 313 ; *Martin v. Franklin*, 38 N. J. L. R. 140 ; *Tallman v. Atlantic Fire Ins. Co.*, 29 How. 71 ; *Livingstone v. Western Ins. Co.*, in App. 16 Gr. 9.

The immediate contract of the insurers being with the mortgagor, he is the party entitled to sue upon the policy, and may recover the amount if unpaid, notwithstanding the direction or authority to pay to the mortgagee : *Caldwell v. Stadacona Ins. Co.*, 11 S. C. R. 212.

Where the mortgagor has insured the premises in pursuance of a covenant to that effect in the mortgage, the mortgagee is entitled to the benefit of the insurance, and may recover it in his own name to the extent of his inter-

est, though not mentioned in the policy, on the ground that the covenant gives him an equitable interest in, and a lien upon, the proceeds of the policy : *Greet v. Citizens Ins. Co.*, 27 Gr. 121 ; 5 A. R. 596 ; where several of the authorities are collected.

The mortgagee's claim is, nevertheless, liable to be defeated by the mortgagor's breach of the conditions of the policy : *Livingstone v. Western Assurance Co.*, 16 Gr. 9 ; *Chishom v. Provincial Ins. Co.*, 20 C. P. 11.

In our case the plaintiff's mortgage contains no covenant to insure. It is contended that the insurance contract, which is not under seal, is with Gurd the mortgagor alone, by whose express request and direction in the application for the insurance, the money which might become payable in the event of loss is by the terms of the policy made payable to the plaintiff "as his interest may appear." I am not prepared to say that Wilson, C. J., was wrong in holding that upon a fair construction of the terms of the policy, both Gurd and Mitchell's interests were insured. It is recited that Gurd has paid \$42 "for insuring against loss or damage by fire, \* \* the property hereafter described, that is to say, &c. \* \* Loss, if any, payable to George Mitchell, M.D., as his interest may appear."

Then it proceeds : "The company shall be subject and liable to pay unto the *said* insured," &c. Why may not Gurd and Mitchell, who were both interested in the subject of the insurance, both be comprehended in that term ? The former is not identified as being the only person insured, as in the cases of *Livingstone v. Western Assurance Co.*, 14 Gr. 461 ; 16 Gr. 9, and *Caldwell v. The Stadacona Ins. Co.*, 11 S. C. R. 212, where the contract was in terms made with the mortgagor as the person insured.

I do not, however, think it necessary to put my judgment on this ground, for assuming that the expression, "as his interest may appear," is to be regarded merely as a reference to the amount which may be due to the mortgagee, and does not create an insurance of his interest, there is, as it seems to me, another ground on which his claim may well be supported.



If the case presented was merely that of a bare contract evidenced by the policy between A., the insurance company, and B. the mortgagor, that A. should pay C., the mortgagee, out of the insurance money, the debt which B. owed the latter, it would probably come within the general rule that a contract cannot be enforced except by one who is a party to it, and therefore the mortgagee, as a third person not a party to the contract, could not maintain any action thereon.

In my opinion this is not a case of that kind, but is rather to be regarded as one in which as between mortgagor and mortgagee, a trust, or at the lowest a lien, has been created in favor of the latter upon the policy moneys. It comes, in short, within one of the exceptions to which the above rule is subject, and which is thus stated by Cotton, L. J., in the recent case of *Gandy v. Gandy*, 30 Ch. D. 57-67:

“If the contract, though in form it is with A., is intended to secure a benefit to B. so that B. is entitled to say he has a beneficial right as cestui que trust under that contract; then B. would, in a Court of equity, be allowed to insist upon and enforce the contract.”

As mortgagee the plaintiff had an interest in the subject of the insurance, and from the evidence of Gillard the defendants' agent, as to the circumstances in which the application was made, from the application itself, from the terms of the policy with which it is incorporated, and from the fact that the policy was by Gurd's direction delivered to the plaintiff by the company's agent, it is, I think, properly to be inferred that there was an agreement between Gurd and Mitchell that the former should insure the vessel for Mitchell's benefit as mortgagee; an agreement by parol it is true, but none the less effectual to create a trust or lien upon the policy moneys in the mortgagee's favor. Without multiplying quotations from cases which have already been fully referred to, I think it sufficient to say that the proposition on which I rely as applied to the facts is abundantly supported by the cases of *Re Flavell—Murray v. Flavell*, 25 Ch. D. 89, and *Touche v. Metropolitan*

*Warehousing Co.*, L. R. 6 Ch. 677, as explained in *Empress Engineering Co.*, 16 Ch. D. 125, and *Gandy v. Gandy*, supra. In *Touche's Case* it will be observed that the trust was apparently established by parol evidence of facts, dehors the contract out of which the defendants' liability arose.

That Gurd, or after the assignment, his assignee Johnson, as the party insured, might have brought the action I do not doubt. It was so decided in *Caldwell v. Stadacona Fire Ins. Co.*, 11 S. C. R. 212, an action by the mortgagor upon a policy of insurance under seal, containing as here a provision that the loss should be payable to the mortgagee. The Court, however, was not there dealing with any question about the equitable rights of the mortgagee, but merely with the objection of the insurers, who had not paid any one, that the action ought to have been brought by the mortgagee, who was not the party insured. See also *McQueen v. Phoenix Ins. Co.*, 4 S. C. R. 660.

If, however, my view is correct, that the insured would, under the circumstances, be a trustee for the mortgagee of the moneys which might be received by him had he brought the action, so that any claim on his part or that of his creditors, would be subject to the prior right of the mortgagee, it seems to follow that the latter may maintain an action in his own name alone, at all events where nothing remains to be recovered upon the policy but the amount due upon his mortgage. That is the case here. The judgment is limited to the amount of the mortgagee's claim. If Gurd or Johnson, or both of them, have been made parties to the record by amendment (which does not appear), they have not appealed. If they are not already parties they cannot now be added, as Mr. Meredith declined to make any application to us for that purpose, and it is too late for either of them to bring an action on his own account, having regard to the limitation clause of the policy. As the action stands, therefore, I hold it is properly constituted in Mitchell's name alone, he being the only person beneficially interested. The plaintiff should have leave, if he desires it, to amend his statement of claim so as to put his claim on the ground on which I think it can be supported.

Passing then to the second objection. I think there was a sale or transfer in fact by Gurd to Johnston. I do not see my way to treat the sale in the suit in the Maritime Court, as between these two persons, either as a mere nullity or as a transfer by operation of law within the meaning of the 4th statutory condition. The suit was promoted by Gurd himself not, it is true, as a real suit, but as a means of transferring the vessel in such a way as it, was supposed might defeat the libel against her in the Detroit Court, and though it would be as ineffectual for that purpose as a fraudulent bill of sale would have been, yet as between the parties, Johnston having subsequently assented to it, one would be as much a transfer in fact as the other, and would avoid the policy under the condition. I am, however, of the opinion, for the reasons given in the Court below, that the defendants are estopped from taking advantage of their omission to indorse their consent to the transfer upon the policy. They have assented to the transfer of the policy to Johnston, a consent not required to be evidenced by writing; and with knowledge of the transfer they have, by reforming or correcting a mistake in the body of the policy as to the name of the property insured, evidenced their election to treat the policy as an existing contract in the hands of the assignee.

As to the third objection, that the loss occurred while black oil, which is said to be crude oil, or earth oil, or a product thereof, was "stored or kept" on the vessel, and therefore that the defendants are not liable therefor under the terms of the 16th statutory condition. I am not prepared to differ from the view taken by the majority of the Court below, that the use of such oil for the purpose of oiling the machinery cannot reasonably be said to be a storing and keeping of it within the meaning of the condition, having regard to the subject of the insurance, a steam tug worked by machinery, and to the fact that oil of the above description is usually and almost necessarily employed in its ordinary management and working: *Hall v. The Ins. Co. of North America*, 58 N. Y. 272; *Liverpool Ins. Co. v. Gunther*, 116 U. S. R. 113. I prefer, however, to

rest my judgment on this point, upon the ground that the statutory condition is qualified by the application, which is a part of, and is incorporated with the policy, and which prohibits only the storing of *camphene, coal oil, or burning fluid* without the special permission of the company, saying nothing of petroleum, or rock, or earth oil.

I agree, that under the circumstances, the proofs of loss furnished to the defendants should be regarded as sufficient.

I concur in dismissing the appeal.

PATTERSON, J. A., concurred with HAGARTY, C. J. O., and OSLER, J. A.

BURTON, J. A.—I quite agree, that as the defendants' counsel declined actually to amend the record, even when permission still to make the amendment was offered by this Court, we are driven to consider the case upon the pleadings as they stand; and the question is, whether, with Mitchell, the sole plaintiff, and the assured no party to the suit, any decree or judgment can be rendered in his favor.

I formerly entertained a very decided impression, that in a case like the present, where a memorandum was indorsed on the policy, "loss, if any, payable to A."; or "loss, if any, payable to A. as his interest may appear," the action would necessarily be in the name of the assured.

The only difference in the two expressions, to my mind, would be that in the former of the two cases a payment by the insurance company to A. would be a complete discharge, whilst in the latter the obligation would be imposed upon the company of satisfying themselves that the appointee had an interest in the mortgage, and the extent of that interest, and any payment beyond that would be no discharge against the claim of the insured.

I am aware, that since the recent legislation, cases, or at least one case, has decided that the person to whom by the insurance the loss is declared to be payable, may sue in his own name; but I have never had occasion to consider the point until called upon to do so for the decision of this case, and I fancied that I might have considered the ques-



tion too much from a common law stand point. I may mention, however, that one of the earliest cases to be found on the subject, *Livingstone v. Western Assurance Co.*, 14 Gr. 401, and 16 Gr. 9, was an action brought in the Court of Chancery by a person in the position of this plaintiff, with this further element in his favor, that by the terms of the mortgage, under which he claimed to be interested, he was entitled, in the event of the mortgagor not insuring, to take out a policy himself as mortgagee, and charge the premium to the mortgagor.

He, however, accepted a policy effected by the mortgagor, the loss being payable to him as mortgagee. The main contention there was, and it was so held by the Court below, VanKoughnet, C., dissenting, that this amounted in effect to an insurance of the mortgagee's interest, and so was not affected by any acts of the mortgagor; but in this Court the decision was reversed, the Court holding that he was not the assured, and that a subsequent breach of the conditions by the mortgagee avoided it, so that the point we are now discussing did not come squarely up for decision.

In the *Bank of Hamilton v. The Western Ass. Co.*, 38 U. C. R. 609, the late Chief Justice Harrison did undoubtedly hold that the person so named could sue.

I think, however, with great deference, that the learned Judge assumed, as I think, erroneously, that such a suit could always have been maintained in equity; and if that was a correct assumption, it was perhaps but a short step to hold that it was a money demand, and so under the provisions of the Administration of Justice Act could be sued for in a Court of Law; the two cases referred to by the learned Judge in support of the position that the appointee could always sue in equity, do not, in my opinion, sustain it.

One was the case I have just referred to, in which the Court held that he was not the assured; the other was the case of *Westmacott v. Hanley*, 22 Gr. 382, which is very far from establishing it.

As I understand that case, there never was any liability

on the part of the insurance company, inasmuch as the policy was avoided by the act of the mortgagor in burning down the insured premises. The policy could not have been enforced against the insurance company; they voluntarily paid the money to the mortgagee, in other words, they purchased his mortgage. Beyond question, if the policy could have been enforced, inasmuch as the premium was paid by the mortgagor, the insurance company could not have called for an assignment of the mortgage, or if assigned to them, they could not have enforced it; but here the policy was avoided; it was a purely voluntary act on the part of the insurance company to pay the amount of the mortgage, and they had the same power to enforce it as the original mortgagee. It is no authority, whatever, for the position that the party named as the person to whom, in case of loss the money shall be payable, could sue in equity.

A great many American authorities are referred to by the learned Judge, but these cases depending on a different system of jurisprudence, can be of little assistance in a case of this nature; I have met with no authority in the English Courts, and none in our own, with the exception I have mentioned, for holding that a person not a party to the contract, having only a partial interest, can sue alone.

It does not appear to me that there is, under the circumstances, any thing in the point that in the cases dealt with in the Supreme Court, the Court were dealing with covenants under seal, inasmuch as the consideration for the contract did not move from the plaintiff and it is now well established that at law, at all events, no stranger to the consideration can take advantage of a contract, though made for his benefit.

That question was set at rest in the common law courts by the case of *Tweedle v. Atkinson*, 1 B. & S. 393, and the better opinion appears to be that even in equity no such right exists.

A case sometimes relied on for such a position is *Gregory*

v. *Williams*, 3 Mer. 582, but it is no authority for it; it merely decides that where property has been assigned to a person upon an understanding that a certain debt due to the plaintiff, and represented at a certain amount should be paid by the transferee to the extent of the amount so represented to be due the plaintiff was entitled to be paid from the property, and that he might join as a co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being fully carried out. Mr. Justice North refers in *In re Flavell*, 25 Ch.D. 89, to the language of Lord Justice James as to the true effect and meaning of that case, where he says in his judgment in *The Empress Engineering Company's Case*, 16 Ch. D. at p. 169 :

"It was a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person."

A dictum in *Touche v. The Metropolitan Warehousing Co.*, L. R. 6 Ch. 671, has been referred to as countenancing such an action; but it is quite clear that Lord Hatherley never intended to lay down any such rule, and the late Master of the Rolls in referring to it in *Re Empress Engineering Co.*, 16 Ch. D. 127, deals with it thus;

"In that case the Lord Chancellor finds as a fact that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Pride are cestui que trusts, that alters the case. It appears to me that they are not."

And in *Gandy v. Gandy*, 30 Ch. D. 56, Cotton, L. J., in referring to that dictum, says:

"If that is intended to lay down the rule as a general proposition of law in the general terms there used, it is not consistent with *Re Empress Engineering Co.*; but it may be that on the facts of the former case it was considered that the contract between Walker and the company was entered into by Walker as a trustee for and on behalf of the plaintiffs; and if so, that is in accordance with what I understand to be the law."

The dictum is also questioned by Mr. Pollock.. See also *Eley v. The Positive Life Ins. Co.*, 1 Ex. D. 88; *Melhado v. Porto Alegre R. W. Co.*, L. R. 9 C. P. 503,

The decision in *Page v. Cox*, 10 Hare 163, was put carefully on the ground that the provision in the partnership articles created a valid trust of the partnership property in the hands of the surviving partner; and in *In re Rotherham Alum and Chemical Co.*, 25 Ch. D. 111, in the Court of Appeal, Lord Justice Lindley refers to such a case thus :

“ But an agreement between A. and B., that B. shall pay C., gives C. no right of action against B. I cannot see that there is in such case any difference between equity and common law; it is a mere question of contract.’

The late Sir James Macaulay, in giving judgment in *Orchard v. Ætna Ins. Co.*, 5 C. P. 445, where the loss was by the terms of a similar insurance to be paid to the plaintiff, shews that the policy in that case was not under seal, and that under non-assumpsit the plaintiff had to establish a contract by the defendants with himself, to do which he must shew that he is the person named in or by the policy as insured. He added :

“ Or the person beneficially interested in the insurance in a way that entitles him to sue upon the policy.”

Draper, C.J., in a subsequent case, *Emery v. The Provincial Ins. Co.*, 10 C. P. 20, referring to the words I have last quoted, points out that they had reference to marine policies only, which contain a general clause that the policy was effected,

“ For and in the name or names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all.”

And that he could find no authority for extending that practice to fire insurance or anything equivalent to it in fire policies in use : and then in answer to the contention that the words “ loss, if any, payable to them,” coupled with an averment in the declaration, that the plaintiffs had an insurable interest, were sufficient to enable the plaintiffs to sue, he adds :

“ I regard the averment of the plaintiffs’ interest as immaterial, for that is not enough singly. The possession of an insurable interest must be coupled with a contract of insurance between them and the insurers ”



*Brush v. The Ætna Ins. Co.*, 1 Oldright 459, a Nova Scotia case, is directly opposed to the decision of this Court, or the old Court of Appeal in *Livingstone v. The Western Ass. Co.* No copy of the opinion of the dissenting Judge is given in the report. The plaintiff there, a mortgagee might have taken out a mortgagee's policy under the terms of his contract, but in place of doing so, he accepted a policy in the name of the mortgagor, loss, if any, payable to Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee. The Court there held contrary, as I have said, to a decision binding upon us, that this constituted a policy on his interest as mortgagee, and could not be affected by any act of the mortgagor. The learned Chief Justice professed to distinguish it from a case of *Grosvenor v. The Atlantic Ins. Co.*, 17 N. Y. 391, where the person named was treated as the appointee merely of the moneys which might become due to the insured upon the contract, on the ground that his interest as mortgagee appeared.

With great deference it appears to me to make no difference; when we refer to the actual contract, we find it was a contract with the insured, and not such a contract as the plaintiff there might have insisted upon, but did not.

But I refer to the case also as a commentary upon another argument that was advanced to us, that the plaintiff was entitled to sue in equity as the cestui que trust of Gurd. I must confess that I feel a great difficulty in discovering any relationship of trustee and cestui que trust between these parties. If the contract had been observed, the money would have been paid direct to Mitchell. Where then does the relationship come in? if the money had been paid into the hands of Gurd there might be some force in the contention that he held at least a portion as trustee for his creditor, but how does any such question arise here. I refer to *Brush v. Ætna Ins. Co.*, in this connection, in consequence of the singular result of the decision; the majority of the Court though holding that the effect of the transaction was to constitute the insurance one upon the mortgagee's interest, nevertheless deciding that he

could recover the full amount of the policy, and hold the excess as trustee for the assured, just the converse of the contention in the present case.

I do not for a moment dispute the proposition that where it appears upon the face of the policy, or perhaps otherwise, that it is effected for the benefit of third persons exclusively, the beneficiaries may maintain an action in their own names if the assured refuses to bring it in his own name on furnishing him with an indemnity.

It is because I cannot discover the relationship of trustee and cestui que trust between these parties, that I am unable to concur with my learned brothers in the decision just pronounced. It appears to me to be essentially different from *Mulholland v. Merriam*, and other cases which have been cited.

If I may be allowed without presumption to say so, I think the "ratio decidendi" of Mr. Justice Strong in that case given with his usual clearness of statement, is in accordance with the authorities, and that the case itself is undoubted, and if I thought it could be applied to the present case, I should most cheerfully follow it, as I agree with the rest of the Court, that the plaintiff's is a just claim, and I should be glad to see my way to giving a decision in his favor. *Mulholland v. Merriam* came within the principle of the decision in *Gregory v. Williams*, to which I have referred.

*Greet's Cases* have been referred to, but are, in my opinion, very clearly distinguishable. There was in those cases no contract by the companies with Brodie to pay the loss to the company of which Greet was liquidator, but an express agreement or covenant between the parties to assign the policies, which was in equity equivalent to an actual assignment. The whole amount was payable to the mortgagees, there being no surplus going to the assured, and Brodie, the person with whom the insurances were effected, was a party to the suits.

I am dealing with this case as I have already said, as we feel ourselves compelled to deal with it as a suit by

Mitchell alone, the assured being no party to the suit; I have not expressed any opinion adverse to the recovery if he had been made a co-plaintiff, or had sued alone, although in the view I take of the case I have not considered the objections which might be urged upon a record so framed

So far from the words "as his interest may appear," assisting the plaintiff, they appear to me to be fatal to his right to recover, framed as this suit is, without joining the mortgagor as a co-plaintiff. There is much more plausibility in the argument in favor of his right to sue alone when the mortgage exceeds the insurance, and the direction is to pay the whole amount to the mortgagee without, qualification of any kind. Why should the insurance company be liable to two actions on this policy, when it might be that there was but a small sum due on the mortgage, to which extent only, in any view of the case, would the mortgagee be entitled to recover; or if the mortgagee should in an action of this kind recover the full amount of his mortgage, what answer would the insurance company have in a subsequent action by the assured, the mortgagor, on the ground that before the mortgagee's recovery the mortgage had been paid off?

I think that it was never in the contemplation of the parties that there should be in case of litigation several actions on this policy, which is not a mere covenant for the payment of money, but only a contract of indemnity. All that can be said is, that it is an unsatisfactory mode of taking security, and the sooner mortgagees wake up to the necessity of being more careful in taking such contracts the better. I confess I can see in this nothing more than a contract between Gurd and the insurance company; that in the event of loss the company will pay it to Mitchell, but that in equity, as at law, it was simply a contract between them and enforceable by Gurd, and that no question of any trust arises.

I think the appeal should be allowed.

*Appeal dismissed with costs.*

[BURTON, J. A., dissenting.]

## McDERMID V. McDERMID.

*Division Court jurisdiction—R. S. O. ch. 51, sec. 70, (c.)—Principal and surety—Action for money paid—Ascertainment of amount by signature—Costs.*

The defendant, for valuable consideration, executed a bond in favor of the plaintiff, conditioned for the payment of the principal and interest secured by a mortgage executed by the plaintiff. The defendant having made default in payment of the interest for four years, the plaintiff was compelled to pay the arrears amounting in all, together with interest on the amount unpaid, to \$163, for the recovery of which he sued the defendant in the County Court when judgment was given for that sum, together with Division Court costs, against which the amount of the defendant's County Court costs was ordered to be set off. *Held*, [reversing the judgment of the Court below] (1) that the debt or money demand arose from payment of the money by the plaintiff, and the amount of it was not ascertained by the signing of the bond. (2) that under the circumstances the Judge had no discretion to refuse the plaintiff, who had been successful in the litigation, his full County Court costs.

*Mitchell v. Vandusen*, 14 A. R. 517, considered and followed.

*Kinsey v. Roche*, 8 P. R. 515 ; *Wiltzie v. Ward*, 8 A. R. 549 ; *Forfar v.*

*Climie*, 10 P. R. 90, approved.

*Graham v. Tomlinson*, 12 P. R. 367 referred to.

THIS was an appeal by the plaintiff from a judgment of the junior Judge of the united counties of Stormont, Dundas and Glengarry, ordering judgment to be entered for the plaintiff for \$163, together with Division Court costs, from which was to be deducted or set off the amount of the defendant's County Court costs.

The plaintiff, by his statement of claim, set forth that being the owner of 100 acres of land in the township of Finch, he mortgaged the same on the 5th of March, 1879, to secure the repayment of \$250 and interest, at 10 per cent. ; principal payable on the 5th of March, 1884, the interest yearly, meanwhile, and the plaintiff covenanted with the mortgagee to pay the same accordingly.

On the 20th February, 1880, the plaintiff conveyed to the defendant, his son, his equity of redemption in the south half of said land in consideration of his assuming the payment of the principal and interest then due on the mortgage, nothing having been paid thereon ; and in consideration of such conveyance the defendant executed to plaintiff a bond for the payment of said mortgage.



That default was made by defendant in the payment of the interest which accrued due in the years 1880, 1881, 1882, and 1883, and the plaintiff, who still retained the ownership of the north half of said lot, was called upon by the mortgagee each year to pay, and plaintiff did pay the same; and the plaintiff sought in this action to recover the four years' arrears of interest so paid for the defendant, together with interest from the times of payment.

The defendant, by his statement of defence, denied the plaintiff's right to recover from him, the money so paid by the plaintiff on the mortgage.

After evidence had been given on both sides, the learned Judge found that the plaintiff was entitled to recover from the defendant the sum of \$163 being the arrears of interest paid by the plaintiff together with interest on the sums so paid.

On motion to enter judgment for plaintiff for \$163 and County Court costs, it was objected on the part of the defendant that the action was within the jurisdiction of the Division Court, and should have been tried in that Court.

After taking time to look into the authorities cited, the learned Judge gave judgment.

\* \* "In *Kinsey v. Roche*, 8 P. P. 515, the action was by a surety who had signed a joint note with defendant. It was held the debt did not exist at the time the note was given, that there was no debt or claim until the plaintiff had paid the note or part of it. It was not ascertained when the note was paid. No doubt the possible liability of the defendant to the plaintiff is limited by the amount of the note. It cannot be larger, it may be less, but whatever it is, it is ascertained by the note.

"In *Wiltzie v. Ward*, 8 A. R. 549, the action was upon a paper which contained a condition, and the learned Judge in his judgment says: 'It may be argued that if the condition were shewn to have been complied with, or performed, the action would be maintainable. This can scarcely be considered a fair interpretation of the expressions here used. The amount is to be *ascertained* by the signature of the defendant. The fair meaning of these words surely is, that the ascertainment means of some certain and definite sum, and not to be subject to any contingency or condition which may never happen. \* \* To hold such an agreement as that sued on within the statute would be contrary to the manifest policy

of the Act as well as contrary to the plain meaning of the words used. I say plain meaning, because the writing does not ascertain the amount due but only the amount that might thereafter become due in certain events' \* \* I have already held that the mortgage mentioned in the pleadings is the mortgage intended by, and referred to, in the bond. And I now hold that by the wording of the bond \* \* the mortgage becomes incorporated with it and forms a part of it, otherwise the bond means nothing. The bond is therefore an undertaking to pay an existing ascertained debt, absolutely ascertained and clearly set out in the bond which is signed by defendant. It is clearly not analogous to *Kinsey v. Roche*, and there is no possible contingency as in *Willsie v. Ward*. I therefore think the case on the bond is clearly within the jurisdiction of the Division Court. My opinion, therefore, is, that the Division Court has jurisdiction in the matter in this cause, and I do not see any good reason for granting the certificate asked for.

"It is ordered that the plaintiff be allowed to enter judgment for \$163 with Division Court costs, and that the defendant be allowed to set off his County Court costs against plaintiff's judgment and Division Court costs."

The plaintiff thereupon appealed to this Court and the appeal came on for hearing on the 28th of May, 1888.\*

*Aylesworth*, for the appellant. I submit that the learned Judge below took an erroneous view upon the question of costs and that the order pronounced by him so far as the same directs a set-off of the defendant's County Court costs against the plaintiff's judgment should be varied, as it is contended he proceeded on an entirely wrong principle in making that order: *Cooper v. Vesey*, 20 Ch. D. 611; *Re Silver Valley Mines*, 21 Ch. D. 381; *Butcher v. Pooler*, 24 Ch. D. 273; *Wansley v. Smallwood*, 11 A. R. 439. But, even the question of costs is a matter entirely in the discretion of the learned Judge, then I contend he has exercised an improper discretion in withholding from the plaintiff his full County Court costs, and worse still in ordering him to pay the defendant's County Court costs, the plaintiff having succeeded in the action. And here the learned Judge having granted leave to appeal, an appeal from the discretion exercised by him in the disposition of the costs will lie: *Mitchell v. Van-*

\**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

*lusen*, 14 A. R. 517, is a distinct authority for this contention. Here the debt sued for or the original amount of the plaintiff's claim was unascertained by the signature of the defendant, as is required by the Division Court Act of 1880, in order to give jurisdiction to that Court. The amounts paid at various times by the plaintiff for the defendant in respect of this mortgage were not, nor was the original amount of the claim, ascertained at any time by the signature of the defendant.

The effect of the bond was, as between the plaintiff and defendant, to make the defendant the person primarily liable for the payment of the mortgage, and to render the plaintiff only secondarily liable in the event of the defendant neglecting to pay. In other words, as between the plaintiff and defendant, the defendant became the principal debtor, and the plaintiff his surety; and the principal debtor having neglected or refused to pay the interest as it accrued, and the surety, the plaintiff, having been called upon to pay did pay the money for the use and benefit of the defendant, the amount of which was never ascertained by the signature of the defendant: *Kinsey v. Roche*, and *Wiltzie v. Ward*, referred to by the learned Judge are clear authority for this position. In fact no liability on the part of the defendant to the plaintiff ever arose until the time the plaintiff was called upon to pay and did pay the money due on the mortgage; and neither then nor at any time since has there been any *ascertainment* by the signature of the defendant of the amount so paid.

*Symons* for the respondent. The only sum the father ever paid for the son was the \$163 and therefore that was the only sum ever payable by the son to his father. He referred to and commented on *Graham v. Tomlinson*, 12. P. R. 367; *Forfar v. Climie*, 10 P. R. 90.

June 29, 1888. PATTERSON, J. A.—The plaintiff made a mortgage on his lot for \$250, payable at the end of five years, with interest payable yearly at ten per cent;

and before anything was paid or due for interest he conveyed part of the land to his son, the defendant, in consideration of the son undertaking the payment of the mortgage.

The defendant gave a bond to the plaintiff in the penalty of \$500, conditioned for the payment of the mortgage money and interest, and reciting the son's agreement to pay it according to the tenor of the mortgage.

The interest was payable on the 5th of March, in 1880, and each of the four following years, and the principal on the 5th of March, 1884. The son paid the principal and the last year's interest to the mortgagee, but he had been away from the country in the four preceding years, and his father, who was directly liable on the mortgage, and who retained part of the land covered by it, paid the interest for those four years.

This action is to recover those payments from the defendant. A defence was set up which did not succeed. The plaintiff has judgment for \$163, but the learned Judge held that the action was within the jurisdiction of the Division Court, on the ground that it was a claim for the recovery of a debt or money demand, the original amount of which was ascertained by the signature of the defendant. In cases of that description the jurisdiction of the Division Court extends to \$200 : R. S. O. ch. 51, sec. 70.

The learned Judge took time to consider the question of jurisdiction for the purpose of awarding the appropriate costs, and he gave effect to the conclusion he arrived at by ordering that the plaintiff should have judgment for \$163, with Division Court costs, and that the defendant be allowed to set off his County Court costs against the plaintiff's judgment and Division Court costs.

If the decision merely deprived the plaintiff of his costs in the exercise of the discretion of the learned judge, there would be something to say against our entertaining an appeal from it, even though the decision was influenced by a doubt or a misapprehension as to the jurisdiction of the lower Court ; but this decision makes the plaintiff, though



wholly successful in his action, pay the costs, or the greater part of the costs, of the unsuccessful defendant, and is, therefore, a proper subject of appeal: *Mitchell v. Van-Dusen*, 14 A. R. 517; *Wills v. Carman*, 14 A. R. 656.

I do not think the decision can be supported.

The fallacy is in treating the defendant's bond as the admission of a debt or money demand due from the defendant to the plaintiff. The agreement recited in the bond evidences the assumption by the defendant of the mortgage debt, and an undertaking to pay it to the mortgagee. The extent of the liability thus assumed is ascertained, but not as a debt to the plaintiff, or as a money demand of his against the defendant.

The remedy for breach of the agreement might take any one of three technical shapes. It might be by action on the bond for the nominal recovery of the penalty, or by action for damages for breach of the recited agreement, or by action for money paid to the use of the defendant at his request, the request being implied from the liability of the plaintiff on the mortgage, and the relationship of principal and surety created by the defendant becoming, by agreement, the principal debtor.

Whichever form of action was adopted, the substantial recovery would be the same, if, as is the case, the plaintiff had paid the money.

This action is essentially an action for money paid to the use of the defendant, and the bond is evidence of facts essential to the maintenance of the action; but the debt or money demand arises from the payment of the money, and the amount of it is not ascertained by the writing in the sense required to give jurisdiction to the Division Court beyond \$100.

The cases cited to us of *Kinsey v. Roche*, 8 P. R. 515; *Wiltsie v. Ward*, 8 A. R. 549; and *Forfar v. Climie*, 10 P. R. 90, are all consistent with this interpretation, and are useful illustrations of the construction of the statute.

I think the appeal should be allowed with costs.

OSLER, J. A.—I will merely add to what my brother Patterson has said, that the case of *Graham v. Tomlinson*. 12 P. R. 367, which is said to have overruled *Kinsey v. Roche*, 8 P. R. 515, has not been overlooked. I have reconsidered the latter case, I hope, without any undue prejudice in favour of it, but see no reason to depart from the view I there took of the meaning of section 23 of the Division Courts Act of 1880, now R. S. O. ch. 51, sec. 70, (c), viz., that the claims there referred to are claims upon instruments, such as notes or otherwise, in which a debt or money demand is acknowledged in favour of a creditor. This does not exclude, nor did I intend to exclude a case where an existing debt or money demand is ascertained by an admission or acknowledgment of it under the signature of the defendant, as in the two illustrations mentioned in the judgment in *Graham v. Tomlinson*, at pp. 369, 370.

What, in my view, was intended by the sub-section was to confer increased jurisdiction upon the Division Court in cases where the *amount* or original amount of the claim being one for a debt or money demand is *ascertained*, as to the amount, by the signature of the defendant. The difference in the scope of sub-sec 3 and sub-sec 2 is marked.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

*Appeal allowed with costs.*

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## McPHERSON V. WILSON.

*Parol evidence—Fraud—Misrepresentation—Written Agreement.*

In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant, swore at the trial that he never agreed to give such notes and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made and that when the writing was read over by the agent no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts, but the Judge refused to permit such evidence to be given as fraud was not set up as a defence; and also refused to allow an amendment setting up such defence by reason of which judgment was entered against defendant, which the Judge refused to set aside.

On appeal, this Court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, were of opinion it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial. The appeal was, therefore, allowed with costs, and a new trial ordered without costs.

THIS was an appeal from a judgment of the County Court of the county of Middlesex, dismissing with costs, an application made to that court, to set aside the verdict entered for the plaintiff, and for a new trial; or to enter a non-suit or judgment for the defendant, and came on to be heard on the 25th of May, 1888.\*

*G. W. Marsh*, for the appellant.

*Macbeth*, for the respondent.

June 29, 1888. HAGARTY, C.J.O.—A written agreement is set out shewing that defendant, in December, 1885, agreed to purchase a machine from plaintiff for \$225, deliverable the following spring in time for the Thorndale fair, and sets out defendant's contract to give his three several notes for \$75 each, payable 1st January, 1887-8-9, averment of delivery, acceptance, and refusal to give the notes or pay the price.

Defence denies the agreement set out, alleges that the agreement was verbal, and no agreement that he should give notes; that three persons were present, called to witness

\**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

the verbal agreement; "that plaintiff's agent requested defendant to sign a writing which he stated was a memorandum of the sale of the machine, and was intended merely to bind the bargain, and would not vary or interfere with the agreement made between them as aforesaid, and defendant signed the writing on that understanding, and it is the only writing that defendant has signed relating to the purchase of the machine."

This language is certainly very inartificial, and somewhat unusual even in these days of loose allegation. But it seems to amount to this: "I made a verbal bargain. I made no promise whatever to give promissory notes. You asked me to sign a memorandum not in any way to interfere with the terms of our bargain, and I signed it on that understanding, and the agreement on which you now seek to charge me is not that which I made."

At the trial the defendant swore he never agreed to give notes; that the agent read the memorandum over; that he does not think it contained any promise to give notes, and that he first heard of notes long after in the summer of 1887; and plaintiff's counsel objected (with success) to his answering the question whether he would have signed it if there had been such a promise.

Two witnesses stated that nothing was said about notes when the bargain was made; that there was no bargain to give notes, and the writing as read did not mention notes. The learned Judge held all this evidence inadmissible to go to the jury as defendant had not pleaded fraud, and refused to add a plea of fraud unless plaintiff consented, and he directed the jury that all they had to give a verdict for was the price.

The object of all rules as to pleading a defence must be that the plaintiff may have full notice of what is alleged against his claim. I think it is clear that the word fraud need not be used, nor the word fraudulently.

But this defence averred that he never made the agreement sued on; that he never agreed to give notes; that the bargain was completed verbally and that he signed the writing produced on the assurance that it was not to vary or interfere with the verbal bargain.



There was thus full notice to plaintiff of the intended defence, and I think it unfortunate that if an amendment had been technically necessary, it was not made. I think it would not have been absolutely necessary for the jury to find that a fraud had been committed by the agent. If they were satisfied that the bargain was completed verbally, —a complete contract—then I think it is open to the defendant to be allowed to shew, if he can, that the writing does not properly represent it, because he signed it on the representation that it was a true statement of the completed bargain, and without being aware of the introduction of a new term as to giving notes. He was stopped when asked if he would have signed if he knew or had noticed this term.

It would not, I consider, be necessary for the jury on a proper direction to find fraud in the agent. It is possible to view what took place as the result of mistake on the part of the latter. The question would be in substance, was there a fully completed verbal arrangement? Was the writing a true reduction of that agreement? Did the defendant sign it on the representation or understanding that it was nothing but a transcript of the verbal contract, coupled, of course, with the express direction that if he read it and signed it with the knowledge of its provision as to notes, he is bound by it.

We may fully agree with the learned Judge in his proper caution as to varying or disturbing a written contract, but we must see whether the defendant was legally prevented from presenting to the jury a defence which he was entitled to offer.

OSLER, J. A.—There ought in my opinion to be a new trial, though I regret it, as I am not disposed to think that the ruling of the learned Judge at the trial will in the end be found to have done the defendant any injustice. But the defence as pleaded does substantially set up that defendant was induced to sign the agreement sued on by the fraud of the plaintiff's agent. He set out that there was a verbal

agreement containing certain terms, and that he was then asked by the agent to sign a writing as a memorandum of the sale to bind the bargain, but which would not vary or interfere with the verbal agreement; that the defendant signed the writing on that understanding, and it was the only writing he signed relating to the purchase of the machine. The writing now sued on contains a promise by the defendant to give notes for the price, which the defendant asserts was not one of the terms of the verbal bargain.

However unlikely it is that the defendant will be able to prove such a state of facts as he has averred in his defence, or to induce a jury to believe that he did not know or had not agreed that he was to give notes for the price, or did not know that the agreement he signed contained such stipulation, the defence as pleaded sufficiently avers that he was induced to sign the agreement by the fraudulent misrepresentation of its contents by the plaintiff's agent. It is not essential that the term "fraud" should be used if the facts alleged shew it.

From time to time during the trial the defendant's counsel was trying, it may be said, to evade the force of this ruling, and some questions were put to the defendant and his witnesses, partly bringing out the defence, the answers to which, so far as the defendant's cross-examination goes, rather lead to the inference that he knew the notes were to be given by him; but nevertheless evidence of the real bargain being other than the writing discloses, was rejected, and the witnesses called by the defendant accordingly do not speak as to it, and the case was submitted to the jury simply upon the question of damages.

Defendant's counsel submitted that there was evidence to shew that "the writing was not in that shape when defendant signed it," meaning, I presume, that it contained other terms than those which the plaintiff's agent had stated that it did contain. To which the learned Judge replied, that he would not submit the evidence to the jury, but would enter a verdict for the plaintiff.

It appears to me that the defendant should on these pleadings have been permitted to give evidence if he could do so, of what the real bargain was, and that if by the terms of that bargain notes were not to be given, the case should have been submitted to the jury whether the defendant's signature to the agreement had been obtained by the agent's misrepresentation of its contents.

I think the appeal should be allowed.

BURTON and PATTERSON, JJ. A., concurred.

*Appeal allowed with costs ; new trial without costs.*

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## STUART V. GROUGH ET AL.

*Attachment of debts—Equitable debt—Payment by garnishee to attaching creditor after appointment of receiver—Receiver.*

The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under rule 370 (Consol. Rule 935) relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in præsentī solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts.

The case of *Leeming v. Woon*, 7 A. R. 42 is not to be followed being founded on *Re Cowan's Estate* 18 Ch. D. 638 which is now overruled by *Webb v. Stenton*, 11 Q. B. D. 530.

Judgment of FERGUSON, J., reversed.

The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of fi. fa. against goods or lands.

After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:

*Held*, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them, (otherwise than by paying it to the receiver), without leave of the Court.

The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor to enforce the order to pay over pointed out.

*Wood v. Dunn*, L. R. 2Q. B. D. 72, considered.

The effect of the appointment of a receiver upon the rights of an attaching creditor considered.

*Hawkins v. Gathercole*, 1 Drew. 12; *Ames v. Birkenhead Dock Co.*, 20 Beav. 332, acted on.

THIS was an appeal by the plaintiffs from the judgment of Ferguson, J., pronounced on the 11th of November, 1887.

The facts, shortly stated, are, that James Sault died in May, 1883, and by his will dated 21st February, 1882, devised and bequeathed his real and personal property to the defendants in trust to be sold for the benefit of his eight children, among others the defendant James Sault, and the plaintiff Samuel Sault, "the proceeds to be divided



between them share and share alike, but so that the said Samuel Sault shall receive \$450 less than the other children." In the event of the death of any of the children before the distribution, the share of the child so dying was to go to his or her "heirs," share and share alike.

In October, 1883, one James Simpson recovered judgment against Samuel Sault for \$1645, and costs, and by way of equitable execution obtained an order for the appointment of a receiver of such part of the proceeds and profits of the estate of said James Sault as the judgment debtor Samuel Sault was entitled to, as was then in or might thereafter come to the hands of the defendants as such trustees. Pursuant to this order one J. M. Stuart was in October, 1883, appointed receiver. He soon afterwards died, and the plaintiff Alex. Stuart was appointed in his stead. It was admitted that due notice of this order and of the several appointments made thereunder had been forthwith given to the defendants.

The testator's estate was sold, and the proceeds received by them in 1886, and this action was by direction of the court brought by the receiver and Samuel Sault as plaintiffs, to compel defendants to pay over to the former Samuel Sault's share of the estate in order to satisfy Simpson's judgment.

In answer to the action the defendants alleged that prior to the recovery of that judgment a garnishee order and summons had been granted on the application of the now defendant James Sault, whereby it was ordered that all debts owing or accruing due from the defendants, the garnishees, to the said Samuel Sault, the judgment debtor, should be attached to answer a judgment theretofore recovered against him by the said James Sault; and that on the 15th September, 1883, an order was made, after service upon the defendants of the attaching order and summons, and after hearing them in person, whereby it was ordered that they should pay to the judgment creditor James Sault the debt due from them to said Samuel Sault, or so much thereof as should be sufficient to satisfy the judgment, as and when

the debt due by them to Samuel Sault should become due and payable, and that in default execution should issue for the same.

These orders were duly served on the defendants before the recovery of Simpson's judgment, and were in full force on the 12th August, 1886, when they paid over Samuel Sault's share of the proceeds of the sale to James Sault in assumed compliance with the order of the 15th September 1883.

The learned Judge of the Court below considering himself bound by the decision of this court in *Leeming v. Woon*, 7 A. R. 42, held that Samuel Sault's interest was attachable as an accruing debt, and dismissed the action.

The facts appear more fully in the report of the case 15 O. R. 66.

The appeal came on to be heard on the 29th of May, 1888.\*

*MacKelcan*, Q. C., for the appellants.—There was no debt owing or accruing due from the defendants to Samuel Sault the judgment debtor on the 3rd September, 1883, when the order attaching such supposed debt was obtained by the defendant James Sault, as judgment creditor.

In *Re Cowan's Trusts* 14 Ch. D. 638 referred to in the judgment appealed from, the money sought to be attached was payable to the judgment debtor by the garnishee under an order of the Court, which was in effect a judgment.

In *Leeming v. Woon*, 7 A. R. 42, money actually in the hands of a receiver payable to a judgment debtor was held to be garnishable. In the present case there was no money in the hands of the garnishees at the time the supposed debt was attached.

The proceeding by garnishment order is only applicable where a third person is indebted to the judgment debtor. Here the judgment creditor is one of the garnishees and is not a third person.

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

The question here is one of priority between creditors, and the creditor who has taken the appropriate proceedings by way of equitable execution to reach the interest of the debtor in his father's estate is entitled to succeed as against a creditor who has not taken the proper steps to do so. An execution against goods would have been ineffectual to reach it; so also would an execution against lands; and an order attaching such interest as a debt would have been equally ineffectual. The appointment of a receiver was the only proceeding by which the interest of the judgment debtor could at that time be reached.

*Moss, Q. C.*, for the respondents.--The order made in the suit of *Sault v. Sault* was properly made by the learned local judge at Berlin, and was warranted by the authorities.

If *Webb v. Stenton*, 11 Q. B. D. 518, decides anything at variance with *Leeming v. Woon*, 7 A. R. 42, the latter being a judgment of our own Court of Appeal, should be followed in preference to that decision.

The Court could not grant the relief asked by the plaintiffs (appellants) without setting aside the order absolute garnishing the fund, which they would have no power in these proceedings to do: *Victoria Mutual Fire Insurance Co. v. Bethune et al.*, 1 A. R. 398.

The respondents in good faith made the payment under the attachment proceedings, and such payment is a valid discharge to them.

The plaintiffs cannot claim any better rights against the defendants than the plaintiff Samuel Sault alone could have asserted, and clearly he could not claim these moneys from the defendants after they had been paid over under an order made in a proceeding to which he was a party, and after due notice to him, and after hearing his rights discussed.

Suppose for a moment that the plaintiff Stuart had received the moneys in question here, he would hold them in trust for the parties entitled according to their priorities, and would at once have to refund the whole to James Sault.

September 12, 1888. OSLER, J. A.—The questions for our decision are (1) whether the interest of the judgment debtor in his father's estate was capable of being attached under rule 370, and following rules of the Judicature Act, as a debt accruing from the trustees to him when the attaching order and the order to pay over were made; and (2) whether payment by the trustees (garnishees) after notice of the appointment of a receiver is a defence to them in the present action.

It may be conceded that if a receiver had not been appointed, payment by the garnishees under the order of a Court of competent jurisdiction would have been a complete discharge to them by force of Rule 376; even though the decisions under the authority of which the order was made had been afterwards overruled or disapproved of. So long as the particular order, having been regularly obtained, remained in force unreversed, the defendants, in the absence of notice of anything directly affecting it, would have been justified in obeying it, and the judgment creditor in enforcing it: *Randall v. Lithgood*, 12 Q. B. D. 525.

It is clear, as the authorities now stand, that the interest of Samuel Sault in his father's estate was not liable to be attached under the rules of the Judicature Act relating to the attachment of debts. It certainly was not a debt legal or equitable presently payable to him by the trustees, nor was it an accruing debt; that is to say, debitum in præsentì solvendum in futuro, within the meaning of Rule 370. The case of *Webb v. Stenton*, 11 Q. B. D. 530, decided two months before the date of the attaching order in this case, exactly applies. There the judgment creditor sought to attach the future income of his debtor, arising out of a trust fund, as an accruing debt. The Court interpret that expression, as applied to an equitable debt, to mean just what it had always been held to mean as applied to a legal debt, viz., a debt debitum in præsentì solvendum in futuro.

The Master of the Rolls says:

“Is that which is attempted to be attached here an accruing debt according to such interpretation. It is obvious



it is not. There is a sum of money which is to be payable out of the proceeds of property when it comes to the hands of the trustees. Nobody can say that until then it is in any legal or equitable sense a debt which is debitum in præsentia. The money may never come to these trustees without any fault of their own, for they may die or cease to be trustees before anything can become due. Therefore there are contingencies upon which no debt may ever arise, and all that can be said of it is that it is probable that at the end of half a year "[or, as we may say here, when the land is sold]" money may come into the hands of the trustees, but until it does come into their hands there is no debt between them and their cestui que trust."

Fry, L. J., said :

"The trustee is not in my opinion an equitable debtor until there is money in hand which he ought to pay to his cestui que trust, or until he has made himself personally liable to pay money to his cestui que trust by reason of some breach of trust or default in the performance of his duties as trustee."

Lindley, L. J., "you may attach all debts whether legal or equitable ; but only debts can be attached, and moneys which may or may not become payable from a trustee to his cestui que trust are not debts."

The case of *Re Cowan's Estate*, 14 Ch. D. 638, which was followed by this Court in *Leeming v. Woon*, 7 A. R. 42, so far as it decides that an order may be made to attach moneys payable to the cestui que trust in futuro as distinguished from moneys actually in the hands of the trustee, was disapproved of, and the Court intimated that the proper course in such a case as this was to move for the appointment of a receiver. Equitable execution may thus be obtained of property which is not the subject of attachment. See *Fuggle v. Bland*, 11 Q. B. D. 711 ; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275, 282 ; *Westhead v. Ryley*, 25 Ch. D. 413.

We must now consider the effect of the appointment of the receiver in Simpson's suit upon the rights and liabilities of the defendants, under the attaching order and order to pay over.

It may be assumed that these orders were obtained in good faith, in pursuit of a remedy which the judgment creditor, James Sault, conceived himself to be entitled to, notwithstanding the unusual circumstance that he was himself one of the garnishees. He had notice in both capacities of the appointment of the receiver.

There is no evidence of the way in which the money was paid to him by the garnishees, but it is not suggested, nor is it in the least probable that it was paid under compulsion of the order to pay over and to avoid a threatened execution.

In *Wood v. Dunn*, L. R. 2 Q. B. 72, the position of a garnishee who pays without compulsion, and in mere compliance as it were with the order to pay over, but with notice of circumstances affecting the right of the attaching creditor to enforce it, is much discussed.

That was an action by the trustee for creditors of one S. under the Bankrupt Act, to recover a debt alleged to be due by the defendant to S.

A judgment creditor of S. had garnished the debt and had obtained and enforced against the defendant the usual order to pay over. It was held, following *Holmes v. Tutton*, 5 E. & B. 65, that the attaching creditor was merely in the position of a creditor holding security for his debt, and not a creditor having a lien within the meaning of that term in the Bankruptcy Act of 1849, and so had acquired by the garnishee order no interest in the debt garnished as against the assignee in bankruptcy. But it was also held that as the debtor, though having notice of the trust deed, had paid by compulsion of the order, and to avoid execution being levied, and because he could not otherwise avoid execution, the remedy of the assignee was against the creditor who had received the debt, and not against the defendant who had thus paid it under the sanction of a court of competent jurisdiction.

"We think," say the Court, "we must take the allegation in the plea to import, either that the defendants had no notice [of the trust deed], or that if they had, it was under such circumstances that they were unable to get the order set aside before they were compelled to pay under the immediate threat of an execution, and to save its being

actually levied. In either of these cases we think the remedy of the assignees is against the execution creditor \* \* it is not necessary for us to decide that it would be safe for a garnishee having been served with an order to pay, and afterwards and before payment receiving notice of a bankruptcy or a trust deed, after that to pay under the order without an immediate threat of execution, and without taking any steps himself to get the order set aside, or giving notice to the assignee informing him that he should pay unless the assignee got the order set aside."

Assuming in this case that the receiver stood in no higher position than the assignee in bankruptcy, yet the defendants, having paid with notice of his appointment, without threat of immediate execution, and without having given the receiver notice of the garnishee order, or an opportunity of setting it aside, would upon the principle of the decision in *Wood v. Dunn*, have assumed the onus of shewing that the equitable execution obtained by Simpson ought not to prevail against the attaching creditors execution by the attaching order, and the Court would have had to determine whether the debtor's interest was one which the attachment could operate upon or charge as against the appropriate form of execution. But it appears to me that the effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over, and the defendants from disposing of, the money received by them (otherwise than by paying it over to the receiver), without the leave of the Court, for the subject matter of the proceedings had by force of the order for a receiver been taken into the custody of the law, and no one else could lay hands upon or interfere with it: *Ex parte Evans*, 11 Ch. D. 691, 13 Ch. D. 252; *Anglo-Italian Bank v. Davies*, 11 Ch. D. 275, 290; *In re Pope*, 17 Q. B. D. 743.

In *Hawkins v. Gathercole*, 1 Drew. 12, under an order of the court made in a suit in which it had been declared that a judgment was a charge upon an ecclesiastical benefice, a receiver was in possession of the funds of the benefice for the benefit of the plaintiff. A subsequent incumbrancer with notice of the appointment of the re-

ceiver, lodged and published a sequestration, but proceeded no further with it. This was held to be an interference with the possession of the receiver and a contempt.

The Vice Chancellor said :

“It is quite clear that when the Court has appointed a receiver, it will not allow the possession of the receiver to be disturbed by any body, however good his right may be, but the party thinking he has a right paramount to that of the receiver, or rather to that of the person who has got the appointment of the receiver, must, before he can presume to take any steps of his own motion, apply to this Court for leave to assert his right against the receiver; that is a plain rule, if it were otherwise it would be impossible for this court to administer justice between parties, and all inconvenience is entirely prevented from the circumstance that on application to this Court, this Court will always take care to have justice done, and to give any party who has a right paramount to that of the receiver, or the party obtaining the receiver, the means of obtaining justice, and will even assist him in asserting that right and of having the benefit of it”

*Ames v. Birkenhead R. W. Co.*, 20 Beav. 332, may also be referred to. On the 8th February, 1855, a receiver was appointed in a suit by the mortgage bond holders of the company to receive the rates, tolls and rents of the company's property. One Williams, a creditor of the company obtained judgment against it on the 26th January, 1855. On the 2nd February, he obtained a garnishee order nisi against fifteen shipmasters owing tolls to the company's trustees, which he served on five of them on the 3rd, 4th, and 5th February. On the 16th February he obtained an order absolute for payment to him of the tolls due by three of them; execution to issue without further order. The plaintiffs moved to commit him for contempt by interference with the receiver.

The question of priorities between the mortgagees and the judgment creditor, was determined on the motion to commit, and the mortgagees were held to be prior, though the creditors' debt was secured by a judgment.



The order for the receiver was held to be valid, and the effect of it stated to be that the trustees were removed from the possession and receipt of the rates, tolls, and rents of the company. It was held that the motion to commit was entitled to prevail. Up to the 5th February, the conduct of the judgment creditor was regular and proper, and if no further step had been taken he would properly have received payment of the tolls from the garnishees. But on the 8th February, the order was made appointing the receiver.

Romilly M. R., says :

“ There is no question but that this Court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with, or to be dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous.

This Court requires and insists that application shall be made to the Court for permission to take possession of any property of which the receiver has taken, or is directed to take possession, and it is an idle distinction that this rule only applies to property in the actual possession of the receiver. If a receiver be appointed to receive debts, rents, or tolls, the rule applies equally to all these cases, and no person will be permitted without the sanction or authority of the Court to intercept or prevent payment to the receiver of the debts, rents, or tolls which he has not actually received, but which he has been appointed to receive.”

These authorities clearly define the position of the parties subsequent to the appointment of the receiver. The debtor's interest was in the hands of the officer of the Court, subject no doubt to all valid charges thereon paramount to that created by the order for the receiver in favor of the party procuring his appointment. But these charges could only be enforced against, or paid out of the fund by permission of the Court, and therefore the most favourable way of looking at the case of the defendants and the attaching creditor is as if it was an application by him for leave to enforce the prior charge alleged to have been created by his attaching order, against the receiver.

All parties being before the Court, it would be unnecessary to send the receiver to another division of the High Court to move to set aside the attaching order. The question would resolve itself into a contest between two execution creditors, and the Court would necessarily have to determine whether at the date of the attaching order, (which was the execution of the judgment creditor James Sault, see *Re Stanhope* 11 Ch. D. 160; *Ex parte Joslyne*, 8 Ch. D. 327, 330; *Emanuel v. Bridger*, L. R. 9 Q. B. 286, 290; 10 Q. B. 485, 490) the debtor's interest in his father's estate was in the nature of a debt, legal or equitable, upon which the order could operate. According to the authorities already cited, it was not; and therefore the only execution really affecting it was the equitable execution of the judgment creditor Simpson.

By this action the same question is merely raised in another form, but the answer must be the same, viz., that the payment by the defendants was wholly unwarranted, and is no defence to the claim of the receiver.

It was urged that, as the attaching creditor had maintained writs of fi. fa. for lands or goods in the sheriff's hands up to the present time, he would still be entitled to priority over Simpson's claim, who, it is said, has not done so. I do not agree in this. The interest of the debtor was not exigible under these writs, and where that is the case, it is the appropriate form of execution, viz., the appointment of a receiver, which binds it. To support that, the issue of a fi. fa. is now an unmeaning and needless formality; *Anglo-Italian Bank v. Davies* 9 Ch. D. 275, per Jessel, M.R.; *Ex parte Evans*, 13 Ch. D. (C. A.) 252.

For these reasons I think the plaintiffs entitled to recover and that the appeal should be allowed.

HAGARTY, C. J. O., BURTON and PATTERSON, J.J.A., concurred.

THE PUBLIC SCHOOL TRUSTEES OF SECTION NO. 9, NOTTAWASAGA V. THE CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA.

*Division Courts Act, R. S. O. (1887), ch. 51, secs. 77, 78—Splitting cause of action—Abandoning excess—Res judicata—Public School Acts, 43 Vict. ch. 32, sec. 4; 48 Vict. ch. 49, sec. 126, R. S. O. 1887, ch. 225, sec. 117—Right of trustees to whole proceeds of rates levied for school purposes—Money had and received.*

In each of the years 1881 to 1886 inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, contending that they were entitled to retain and apply it towards payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under sec. 365 of the Municipal Act :

*Held*, [affirming the judgment of the County Court], that this section did not apply, and that the money having been collected for school purposes the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools Act of 1885, 48 Vict. ch. 46 ; R. S. O. 1887, ch. 125, to alter the law in this respect.

The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon.

In 1887, the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was *res judicata* by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover, because by suing in the Division Court for the surplus of 1881 alone, they had divided their cause of action into two or more suits contrary to sec. 77 of the Division Court Act, R. S. O. 1887, ch. 51.

*Held*, [reversing the judgment of the County Court] (1) that the recovery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under sec. 77, or after abandonment of the excess under D.C. Rule No. 8, was no defence to an action for the surplus rates received by the defendants in the subsequent years : (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action.

*Semble*, that the several claims being entirely distinct and unconnected, did not form "cause of one action" so as to come within the prohibition of sec. 77 against dividing a cause of action.

*Re Ackroyd*, 1 Ex. 479, referred to.

The proper form of judgment in the Division Court when the excess is abandoned or the action is for balance of an account pointed out.

THIS was an appeal by the plaintiffs from the judgment of the junior Judge of the County Court of the county of

Simcoe, dismissing the action, and came on to be heard before this Court on the 25th of May, 1888.\*

The facts are clearly stated in the present judgments.

*Aylesworth* for the appellants.

*Strathy*, Q.C., for the respondents.

November 13th, 1888. OSLER, J. A.—The facts shortly are, that the plaintiffs in each of the years 1881 to 1886 inclusive, made a requisition upon the defendants, pursuant to the Public Schools Act, R. S. O., ch. 204, sec. 102 (12), for moneys required by them for school purposes, and the defendants in each year collected and received from the school rate necessarily imposed by them to procure the amount demanded, a small surplus over and above such amount, as follows :

|                           |          |
|---------------------------|----------|
| In 1881 a surplus of..... | \$43.37  |
| In 1882           “.....  | 23.58    |
| In 1883           “.....  | 24.29    |
| In 1884           “.....  | 42.80    |
| In 1885           “.....  | 46.89    |
| In 1886           “.....  | 24.57    |
| <hr/>                     |          |
| Total                     | \$205.50 |
| <hr/>                     |          |

These sums were not paid over to the trustees with the amounts asked for, but were treated as belonging to the general funds of the municipality. The plaintiffs contended that they were entitled to the whole sum produced by the rate, and sued the township (it was said as a test action) in the Fourth Division Court of the county, for the surplus of 1881 alone. They obtained judgment therefor at the September sittings 1887, and afterwards brought this action in the County Court for the surplus collected in the five subsequent years. The defendants pleaded that the sums sued for were collected by reason of the rate levied being the approximate rate they could ordinarily levy in

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



order to obtain the sums demanded, which sums were duly paid over to the plaintiffs, and that the plaintiffs were not entitled to be paid the excess, which the defendants hold to be appropriated to the special local object under 46 Vict. ch. 18, sec. 365.

At the trial the defendants were allowed to add a plea to the effect that when the moneys sued for were due (if due at all), viz., on the 27th August, 1887, the plaintiffs entered an action in the Fourth Division Court of the County of Simcoe, against the defendants upon and for the same causes of action as those mentioned in the statement of claim, said action being to cover a portion of certain moneys due by defendants to plaintiffs of which the moneys mentioned in the statement of claim herein *are the balance*, and afterwards judgment was recovered by the plaintiffs for the amount sued for in that action, whereby the plaintiffs are estopped from proceeding for any of the moneys mentioned in the statement of claim herein, and are barred by recovery of said judgment in the Division Court.

The learned Judge held that the plaintiffs by suing for the surplus of 1881 alone had divided their existing cause of action, or "split their claim," within the meaning of sec. 59 of the Division Court Act, R. S. O. ch. 47 (R. S. O. 1887, ch. 51 sec. 77) and that the judgment recovered in the Division Court was therefore a bar to this action for the residue of the claim.

In the action in the Division Court he had already determined in favour of the plaintiffs' right in other respects to recover the surplus produced by the rate.

That right is now contested by the defendants, and the questions for our decision are, (1) whether the trustees are entitled to the surplus produced by a rate in good faith imposed and levied by the township for the purpose of procuring the sum demanded: and if so (2) whether the judgment in the Division Court is on any ground a defence to the present action. On each of these points the learned Judge below has presented his views in a clear and carefully considered judgment.

On the first question, I entirely agree with him. I think that the school trustees are entitled to the surplus, which may be said to be the necessary increment or addition produced by a rate in good faith imposed and levied by the township to raise the sum demanded.

There is said to be a practical difficulty in striking a rate which will produce the precise sum required, having regard to the expenses of assessment and collection, and the probability that some of the persons assessed will make default.

If the rate is substantially excessive, it, or the by-law imposing it, may be quashed or set aside; but it is not objectionable merely because it will produce, if levied and collected from all the parties assessed, a sum slightly in excess of that required: 2 C. P. 89, 3 C. P. 25. The same may be said of any by-law by which a rate is imposed, but in the case of a school rate the surplus incidentally arising, cannot be appropriated to the general purposes of the township. Having been received from the ratepayers of a particular school section for school purposes, it appears to me that the statute declares that the trustees of that section are entitled to it.

Until the year 1879, public school trustees had the right by sec. 102, sub-sec. 12 of the Public School Act, either to require the township council to levy and collect by rate through their collector or other municipal officers, all money needed for school purposes, or, as they might judge expedient, they might do so themselves by their own lawful authority.

In both cases any small surplus would belong to and be payable to the trustees; certainly when they themselves collected the rate, and I can see no just ground for making any distinction when the township collected it for them.

The Assessment Act, R. S. O., ch. 180, sec. 88 (R. S. O., 1887, ch. 193, sec. 119), enacts that in making out the collector's roll the township clerk shall insert in one column any special rate, or local rate, or school rate, the proceeds of which are required by law to be kept separate

and distinct, and accounted for separately, and that any such rate shall be calculated separately. And by sec. 78 (b.) of the Public Schools Act, R. S. O. ch. 204, he was required to place columns in the roll, so that under the head of "school rate," the public school rate might be distinguished from the separate school rate, and the proceeds of such rate were to be kept distinct and accounted for accordingly. This enactment is repeated in the Public Schools Act, 1885, 48 Vict. ch. 49, sec. 122; R. S. O., 1887, ch. 225, sec. 121.

Sub-sec. 7 of sec. 78, enacted that it should be the duty of the township council, through their collector or other municipal officers, to cause to be levied in each year upon the taxable property liable to pay the same, all sums of money for rates or taxes legally imposed thereon in respect of public or separate schools by competent lawful authority, and at their request, and to account annually for the sums so to be collected.

By 42 Vict. ch. 34, sec. 11, (1879) the power of trustees of rural school sections in organized districts, 48 Vict. ch 49, sec. 51, to levy and collect rates on their own authority, was taken away, and they were required to obtain all moneys for public school purposes which were leviable by rate, by the means and under the provisions contained in sections 78 and 79 of the Public Schools Act.

These so far as important I have already referred to. It is observable that the trustees of Roman Catholic separate schools were not deprived of the power of imposing and collecting school rates by their own authority, and by the Separate School Act of 1886, 49 Vic. ch. 46, which amended and consolidated all the existing Acts relating to separate schools, the exceptional right of procuring school moneys in either way at their option is expressly recognized and again conferred upon Roman Catholic separate school trustees.

Then the Public Schools Amendment Act, 1880, 43 Vict. ch. 32, sec. 4 enacts, *inter alia*, that any expenses attending the assessment, collection, or payment of school rates by the

Council or its officers for the trustees entitled thereto, shall be payable by the municipality, and that *the said rates* as and when collected, shall within a reasonable time thereafter, and not later than the 20th December, in each year, be paid over to the trustees *without any deduction whatever*. It is declared that these provisions shall apply to separate School Boards or trustees who may exercise their option of having their school rates collected by the Municipal Councils.

Thus the law stood when the rates of 1881, 1882, 1883, and 1884 were levied and collected by the defendants, and upon the plainly expressed terms of the Act of 1880, I can see no answer to the claim of the trustees for the surplus rates collected in those years.

In 1885 the Public Schools Acts were consolidated and amended by "The Public Schools Act, 1885," 48 Vict. ch. 49. Part of sec. 4 of 43 Vict. ch. 32, above referred to, appears there as sec. 126, "*all sums* levied and collected by the Municipal Council of any township *for School purposes* shall be paid over to the secretary-treasurer of the Board without any deduction whatever on or before the 15th December in each year."

This is now found in R. S. O. 1887, ch. 225 sec. 117.

But I am of opinion that, except as respects the date of payment over, this was not intended to alter, and did not alter the existing law. The moneys collected in 1885 and 1886 were sums collected for *school purposes*, and as such were, by the consolidated section, *to be paid over*, without deduction in the year in which they were collected.

I cannot agree with the defendants' contention, that section 365 of the Municipal Act, 1883, which provides for the appropriation of the balance where the sums collected exceed the estimates, applies to this case. The estimates referred to in that section are those mentioned in sec. 361, namely the estimates made *by the council* of the sums required for the lawful *purposes of the municipality* for the current year.



Passing to the subject of the principal appeal, viz., the effect of the proceedings in the Division Court. In the Court below this appears to have been relied on as a defence, partly on the ground that the subject of the present action was *res judicata* by the judgment of the Division Court, and partly on the ground that by suing in that Court for the surplus rate of 1881, and then bringing this action for those of the subsequent years, the plaintiffs were infringing the provision of the Division Courts Act against dividing a cause of action, and so were not entitled to recover in the second suit.

The latter objection, however, as I shall afterwards point out, is not open to the defendants as a substantive defence to this action. The prohibition against dividing a cause of action may be said to be in the nature of a limitation upon the jurisdiction of the Division Court, by which in certain cases a plaintiff who has a number of demands, in themselves essentially separable, but which if united would form "cause of one action" in the Superior Court or County Court, is forbidden to divide them into two or more actions for the purpose of bringing them within the jurisdiction of a Division Court.

They are, in this respect, to be treated as one cause of action, though they are not *the same* cause of action in the sense that if a defendant has permitted a judgment to be obtained for one of the claims, it is *necessarily* a bar to an action for the remainder.

It depends altogether upon the form of the claim or judgment in the first suit ; unless, therefore, the defendant can make out that the subject of the present suit is in some way *res judicata*, they must fail, and there is, in my opinion, no defence of that nature here.

The suit in the Division Court was strictly confined to one particular item of claim. Nothing was in question there but the surplus rate of 1881, nor could the plaintiffs have recovered there what they are now proceeding for, because their claim would then have exceeded the jurisdiction of the Court. There is nothing to shew that they had

elected to dispose of their whole demand in the Division Court, and to bring themselves within the jurisdiction by abandoning the excess, or suing as for the balance of an unsettled account. If they had done that, the judgment would have been entered accordingly, and would by force of sec. 78 of the Division Courts Act, have been a full discharge of the whole account. They simply sued in the first action for one of several unconnected demands, and the sum now claimed neither could have been recovered, nor was it in fact litigated or disposed of therein. The case is governed in principle by authorities from which it is needless to quote, such as *Seddon v. Tutop*, 6 T. R. 607; *Thorpe v. Cooper*, 5 Bing. 129; 11 C. P. 589; 6 C. P. 249. See also *Bronsdon v. Humphreys*, 14 Q. B. D. 141.

The case of *Lord Bagot v. Williams*, 3 B. & C. 235, referred to in the judgment below and relied on by the respondents, is quite distinguishable. The causes of action in that suit were assumed to have been included in the former suit between the same parties in which the recovery was had, and were such that they might have been recovered therein. Judgment had passed by default, and instead of assessing the damages before a jury upon a writ of inquiry, the agent of the plaintiff, who knew of the existence of all the causes of action, by his affidavit of verification proved the debt before the master, and fixed the amount, taking judgment for a less sum than he knew to be due, because as he supposed, the defendant had no property in value exceeding that sum. "He thereby," as Abbott, C. J., said, "put himself in the place of a jury whatever facts were known to him may be considered in the same light as if they had been laid in evidence before a jury and they had drawn a conclusion from them; and if a jury, having in evidence before them all the facts which were known to the plaintiff's agent, had found that £3,400 was the sum due, it is quite clear that the plaintiff could not maintain a second action in respect of any of the sums of money which had thus been brought under the consideration of the jury."

Here it has been made perfectly clear that the claims in the two suits are not identical, and that those now in question were not, and could not have been in question in the former suit.

It is unnecessary, in this case, to determine whether the whole of the claims for the different years' surplus were so connected as to form *a cause* of action within the meaning of those words as used in section 77 of the Division Courts Act. My impression is, that they were not. That section, which is to be read in connection with section 78, and also with rule 8 of the Division Court rules of 1869, enacts that "a cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of the Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be maintained where the unsettled account in the whole exceeds \$400.

Section 78. A judgment of a Division Court upon an action brought for *the balance of an* account shall be a full discharge of the account for the balance of which such action was brought, and the entry of judgment shall be made accordingly.

Rule 8. "Where the excess is abandoned it must be in the first instance upon the claim," &c. In these provisions we have, as Harrison, C. J., observed in *McKenzie v. Ryan*, 6 P. R. 323, the equivalent of sec. 63 of the English County Courts Acts, 9 & 10 Vict. ch. 95; though there is a limitation as to the amount of the unsettled account which may be investigated which does not appear in the latter.

The leading case is in *Re Aykroyd*, 1 Ex. 479. There the sub-contractor of a Railway Company had given his workmen orders for goods which were supplied by the plaintiff who brought 228 actions in the County Court against the defendant in respect thereof for sums amounting in the aggregate to £303 19s.

A prohibition was granted, though one claim only amounted to £5, and many to less than 20s.

"The probability is," said Pollock, C. B., "that in enacting that a cause of action should not be divided, the legislature meant a cause of action which, but for the enactment, would be divisible; \* \* a great inconvenience would follow if the term "cause of action," were interpreted to mean cause of action on one separate contract; and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus* count, which according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter, and we think that we ought to hold that the 63rd clause does apply (whether to all debts which could be comprised in one description in one count as for goods sold or not, we need not now decide) but at all events to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous so that one item, if not paid, shall be united with another, and form one entire demand. If that demand exceed £20, it ceases to be within the jurisdiction of the County Court."

In other words, as the Court pointed out in the subsequent case of *Wood v. Perry*, 3 Exch. 442, it was held that the words "cause of action," in this Act meant "cause of one action," within the limitation suggested, and were not to be limited to an action upon one separate contract. See also *Dodd v. Wigley*, 7 C. B. 106 (note); *Bonsey v. Woodsworth*, 18 C. B. 325; *Kimpton v. Willey*, 9 C. B. 719, 728.

In *Wickham v. Lee*, 12 Q. B. 521, it was said that it was not a splitting of actions to bring distinct plaints where in Superior Court there would have been two counts. Whether the converse of this is true, where the claims, though similar, as *e. g.* for money lent or money paid, are unconnected, and there has been no course of dealing as in the case of tradesmen's accounts evidencing an intention



that the whole shall terminate in one contract, or where the parties have not treated the claims as forming one entire, demand has not been decided that I am aware of. However this may be, the defendants are not in a position to take the objection here. If the plaintiffs had entered two or more suits in the Division Court, comprising the whole of their demand, the question whether they were dividing a cause of action exceeding the jurisdiction of the Division Court, might have been raised before the Judge in any one of the suits, or by motion for prohibition as in *Re Aykroyd*, and the other cases cited; and in the suit which was entered, it was equally open to the defendants to contend, (although as I have said, I think their contention would not have been well founded) that the whole of the claims were so connected as to form a single cause of action within the meaning of the section, and to insist that the excess should be abandoned, or the claim so framed as to make it apparent that the plaintiffs were suing for the balance of an account, the judgment on which would be a discharge of the whole.

*Vines v. Arnold* 8 C. B. 632, is very much in point. There the plaintiff first brought a plaint in the County Court for one part of his demand and recovered judgment, and afterwards brought an action in the Superior Court for the remainder, the whole, though made up of two distinct debts, being a claim which would form a "cause of one action." It was held that the mere levying a plaint for part of the demand was not *per se* an abandonment of the excess. "There must be something done by the plaintiff to constitute an abandonment of the excess of the demand within the 63rd section. Where the debt exceeds the sum to which the jurisdiction of the Court extends, that enures as a defence, and entitles the defendant to judgment, unless the plaintiff elects to bring himself within the jurisdiction by abandoning the excess."

In *Kimpton v. Willey*, 9 C. B. 719, 728, the second suit was brought in the County Court, and one ground on which the defendants rule for prohibition was discharged was

that it was too late after the first action had been disposed of to object that the whole claim exceeded the jurisdiction, and that the cause of action had been divided: *Adkin v. Friend*, 38 L. T. N. S. 563, is to the same effect.

I think the plaintiffs entitled to recover, and that the appeal should be allowed.

BURTON, J. A.—The question of *res judicata* is one with which we were at one time much more familiar than we are at the present day, owing probably to our then system of pleading. But the case is very concisely put by Mr. Taylor in his work on evidence, so far as it affects the the question now before us.

“If a plaintiff knowing that he has an unliquidated claim on a defendant for a large amount chooses to sue him for a less sum than is due, or having a demand of £60 in three sums of £20 each, he consents at *nisi prius* to accept a verdict for £40 he cannot afterwards bring a second action for the residue, that is to say, if having a larger unliquidated demand he is content to sue for less, or if having included the whole demand in his declaration he accepts a verdict for a portion only he can, not under such circumstances, again litigate the question which might have been disposed of in the former case.”

So, if a defendant chose to go down to trial with a plea of set-off on the record, and a verdict was taken without an application to strike out the plea, the judgment recovered would bar any subsequent action to recover the money which was the subject of the set-off; but this was upon the ground that the matters might have been and presumably were disposed of in the former action; but the plaintiff in the one case and the defendant in the other might have forborne to sue or set off the amount sought to be recovered in the subsequent action, in which case the former recovery could be no bar.

It is clear to my mind that the recovery for the amount received by the defendants in 1881, can be no answer to an action for the moneys received in subsequent years.

They are perfectly distinct debts, as much so as if they had been several promissory notes for the same sums.

I think for similar reasons that the suing for the 1881 moneys was not a splitting of a cause of action within the prohibition of the Division Court Acts; the subsequent receipts constituting perfectly distinct debts having no connection with each other.

I am of opinion, therefore, that the learned Judge's decision was incorrect; but I think that the reasons on which the previous judgment in the Division Court was founded, were sound, and that judgment should have been given therefore on the merits in favour of the plaintiffs.

It is a matter of impossibility in practice to levy the precise sum required to be levied. There must, in every case, be a surplus or a deficiency, and as a matter of prudence and economy, it is safer for the parties striking the rate to err in the former, than in the latter direction. If when the trustees could themselves strike and enforce the rate, the surplus would remain in their hands, to be applied to the school purposes of the section, it is difficult to understand why, upon principle, the same result should not follow when the rate is struck and raised at their request by the officers of the municipality.

The trustees are the parties entrusted by law with the management of the school section, and the parties to determine on the amount required to be levied for the purpose; and when the legislature enacted as a matter of convenience that the rates should be collected in the manner provided for the collection of the taxes, I should have supposed that no further change was intended than the substitution of one collector for another, but the language of the statute, in my opinion, confirms this.

It is: "Any expenses attending the assessment collection or payment of the school rates by the municipal council, or any of its officers, for the trustees entitled thereto, shall be payable by the municipality, and the said rates as and when collected shall, within a reasonable time thereafter, and not later than the 20th December in each year, be paid over to the trustees without any deduction whatever."

Why this should be construed to mean the amount specified in the requisition, is not apparent to my mind; it seems to me not to be warranted by the words used, which are that the rates, not, so much of the rates as will satisfy the requisition, but all the rates as collected shall be paid over to the trustees without deduction.

I must confess that I can see no objection to the trustees enforcing by action the payment of moneys which the township has no right to retain, and which, by the terms of the statute, should be paid over to them.

I have read the learned Judge's reasons with great care, and cannot say that his conclusion, on this point, is wrong, which is sufficient reason for my concurring in affirming the right of the plaintiffs to recover.

HAGARTY, C. J. O., concurred.

PATTERSON, J. A., had been appointed to the Supreme Court before judgment was delivered.

*Appeal allowed with costs.*

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## WARNOCK V. KLÖPFER.

*Fraudulent Preference*—"Insolvent circumstances"—48 Vict. ch. 26, sec. 2, (O.)—Assignment of book debts.

A man may be deemed in "insolvent circumstances," within the meaning of 48 Vict. ch. 26, sec. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

*Held*, also, [affirming the judgment of the Ch. D. 14 O. R. 288] that book-debts are a species of property covered by sec. 2 of the 48 Vict. ch. 26 (O.) and that any gift, conveyance, assignment, transfer or delivery thereof by a debtor in insolvent circumstances is void.

BURTON, J. A., dissenting on this point.

THIS was an appeal by the defendants from the judgment of the Chancery Division reported 14 O. R. 288, and came on for hearing before this Court on the 15th of May, 1888.\*

G. W. Field, for the appellants.

Masson, Q.C., for the respondents. The facts giving rise to the action, and the points relied on by counsel, appear in the former report, and in the present judgments.

September 12, 1888. OSLER, J.A.—This action is brought by the plaintiffs who are judgment creditors of one James McNeil, to set aside an assignment of book debts made by him for the benefit of the defendants at a time when he was in insolvent circumstances and unable to pay his debts in full, whereby the plaintiffs were hindered, defeated and delayed in the recovery of their debt, and the effect of which was to give the defendants a preference over the other creditors of the assignor.

The action was tried before the late Mr. Justice O'Connor, without a jury. He found that the debtor was insolvent at the date of the assignment (23rd October, 1885), and held that it was void as against the plaintiffs, under 48 Vict. ch. 26, sec. 2, (O.)

*Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

The judgment at the trial was affirmed by a Divisional Court of the Chancery Division, from whose judgment the present appeal is brought.

The only question argued before the Divisional Court was, whether the debtor was insolvent at the date of the assignment. I think the evidence fully supports the finding of the trial Judge on that point. It is analyzed in the judgment of the learned Chancellor. I agree with the view he takes of the facts and of the meaning of the expression "insolvent circumstances," and can add nothing to what he has said.

On the argument of the appeal, the objection was taken that the Act does not forbid a debtor to prefer a creditor by an assignment of his book debts, they being, it is said, a species of property not covered by section 2 of the Act. That section enacts that every gift, conveyance, assignment, transfer or delivery over, or payment of any goods, chattels or effects or of bills, bonds, notes, securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property real or personal made by a debtor in insolvent circumstances, shall as against creditors be utterly void. It is sought to apply to this section the well known rule of construction that general terms following particular ones apply only to such matters as are *ejusdem generis* with those which have been specially enumerated, and the contention is that mere debts, book debts, are not *ejusdem generis* with other kinds of personal property particularised in the earlier part of the section, and therefore are not comprehended in the subsequent general words "any other property real or personal," which must as regards personal property receive a corresponding limitation.

The section for which this has been substituted, presented a simple illustration of the rule. The words were : "In case any person makes any gift, conveyance, assignment, or transfer of any of his goods, chattels, or effects, or delivers or makes over any bills, bonds, notes, or other securities or property," &c.

It was held in *Newton v. Ontario Bank*, 15 Gr. 283. and other cases, that "property" must be read as meaning property ejusdem generis with that previously mentioned, and that the enactment therefore did not apply to real estate. See also *Carradice v. Currie*, 12 Gr. 108; *Re O'Donohoe*, 23 Gr. 408; *McNab v. Peer*, 32 C. P. 546.

The real property of the debtor is now expressly included, and we have to see whether by necessary construction any class of personal property is excepted.

The words in the first part of the section are of course *primâ facie* sufficient to include every class.

"*Primâ facie* the words goods, chattels, and effects are general and unlimited expressions as applied to personality." Knight Bruce, V. C., in *Parker v. Le Marchant*, 1 Y. & C. Ch. Cas. 290.

Debts would pass by the words "goods and chattels": *Bennett v. Batchelor*, 3 B. C. C. 29; 1 Jarm. 719, 3rd ed.; *Campbell v. Prescott*, 15 Ves. J1. 503.

The reason why choses in action were formerly held not to be goods and chattels within the 13 Eliz. ch. 5, viz., because they could not be seized by creditors, is quite inapplicable to the present state of the law, as they may now be taken in execution either by the ordinary process of *fi. fa.*, when they consist of debts merely, by process of attachment under the rules relating to the attachment of debts, and there is no reason in principle why the creditor's right to remove obstacles placed by the debtor in the way of his execution should not be the same in the one case as in the other.

"The attachment or garnishee order is a mode of enforcing by execution the payment of the debt in the original action," per Jessel, M. R., *Re Stanhope Silk Stone Collieries Company*, 11 Ch. D. 160.

"It is impossible on any principle to distinguish this case of an execution against debts from an execution against goods and chattels. In this particular case the execution creditor is made his own sheriff, and he is allowed to make his own execution, just as a landlord puts in a distress for rent. There is no distinction in principle

between them," per James, L. J. *ib.* See also *Emanuel v. Bridger*, L. R. 9 Q.B. 286, 290 ; *Ex p. Joselyne*, 8 Ch. D. 318.

In *Labatt v. Bixel*, 28 Gr. 593, (for a reference to which I am indebted to my brother Rose), it was expressly held by the late Chief Justice Spragge that book debts were "property" within the meaning of the former Acts, C. S. U. C. ch. 16, sec. 18; R. S. O. ch. 118, sec. 2, and an assignment thereof was set aside at the instance of a judgment creditor of the assignor as a fraudulent preference within the Act. The question had been previously raised but not decided in *Rettinger v. McDougall*, 10 C. P. 395, on a motion by the assignee to set aside an attaching order, Draper, C.J., observing: "I think it better to abstain from giving an opinion whether under all the circumstances of the case the assignment to B. comes properly within the spirit of sec. 18, ch. 26 C. S. U. C., as it certainly does within the letter." See also *Ferguson v. Carman*, 26 U. C. R. 26.

Whatever difficulties may have been supposed to exist in the way of holding that choses in action other than those specially mentioned were included in the former Acts, I think we are not now embarrassed by them. Attachment is a recognized process of execution common to all the Divisions of the High Court, instead of being, as it formerly was, a special proceeding upon judgments of the Superior Courts of Law. We have, moreover, to deal with an enactment which does not admit of being construed by any supposed analogy to the former section. It now forms part of an Act which is in *pari materiâ* with the Creditors' Relief Act, and is of very different character and scope from those in which it has been hitherto found. I am of opinion that the intention of the Legislature, as indicated by the language of the section itself, and by other sections of the Act, requires that the general words should have their full operation.

"We have to consider not merely the words of the Act of Parliament, but the intent of the Legislature to be collected from the cause and necessity of the Act being made;



from a comparison of the several parts, and from foreign, that is to say, extraneous circumstances so far as they can justly be considered to throw light upon it." *Hawkins v. Gathercole*, 6 D. M. & G. 1.

In 1 Jarm. 724, many cases are referred to, which, as the writer says:

"Indicate the disposition of the Judges of the present day to adhere to the sound rule which gives to words of a comprehensive import their full operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

In *Twycross v. Grant*, 2 C. P. D. 469, 530, per Cockburn, C. J.:

"I take it to be a sound canon of construction in the application of a statutory enactment, that full effect should be given to the general terms, unless from the context, or other provisions of the statute, a limitation on the general language must necessarily be implied, especially where, had such a limitation been intended, it might reasonably have been expected to be expressed."

In former Acts the Legislature contented itself with prohibiting the preferential assignment of certain kinds of property, and if the debtor made an assignment otherwise than for the benefit of creditors generally, it merely followed that execution creditors obtained priority in order of time against that property as well as against the real estate. But the Legislature has now manifested a clear intention to supply, as nearly as it can venture to do so, the absence of an insolvent Act, and to ensure the equal distribution of the property of the debtor among his creditors generally, either by a process of voluntary liquidation, or under the executions against him.

The object of sec. 2 is to prevent as far as possible any disposition of his property otherwise than by a general assignment for the benefit of all his creditors. If the debtor will not take that course the law provides for its being done by means of the executions against him. This is not limited to the ordinary executions against goods, for

by sec. 37 of the Creditors Relief Act the sheriff holding such an execution may obtain an order to attach debts, and may proceed to recover them just as a creditor could do, and the proceeds are to be distributed by him in the same way as if he had realized the money under an ordinary execution. And if the execution creditor himself takes the proceeding, moneys realized by him are to be paid over to the sheriff and distributed upon the executions in his hands.

Primâ facie, therefore, we should not expect to find the section now under consideration (which is an amendment and extension of the former section) so framed as to leave the debtor free to deal with a description of property, which often forms a large proportion of his assets.

The result of restricting the general words would practically be to deprive them of meaning, for if they do not include debts owing to the insolvent, the other terms of the section are wide enough to embrace almost every other kind of personal property.

“The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called ejusdem generis. In such a case we must have recourse to the rule that if particular words exhaust the whole genus the general words must refer to some larger genus.” *Fenwick v. Schmaltz*, L. R. 3 C. P. 313, 315.

The peculiar frame of the general clause, “any other property real or personal,” indicates moreover that it was not to be restricted to things ejusdem generis with those previously mentioned, but was intended rather as a sweeping net to include property of every description.

It may be inferred that money would have been included if it had not been expressly excepted by section three.

I do not think that section 4 aids defendant's contention. On the contrary when read with sec. 3, sub-sec. 1, I regard it as directly opposed to it. The assignment for the general benefit of creditors mentioned in those sections plainly includes all the debtor's property, real and personal, except such as is by law exempt from seizure and sale under

execution. Sec. 3, sub-sec. 1, declares that nothing in section 2 shall apply to such an assignment. Therefore the only assignment excluded from the prohibition of that section (with certain other exceptions specially mentioned) is an assignment of the whole of the debtor's property for the benefit of his creditors generally. The proper inference from that is, that no property which is covered by the general assignment which the Act permits, that is to say, no property which is subject to execution for debt, can be reserved from it, or made the subject of a preferential assignment. In section 3, in short, are to be found the only exceptions from the general prohibition of section 2.

I attach no significance to the use of the word "credits," in sec. 4, as indicating that something not covered by sec. 2 will pass by the general assignment, since "credits," which I take to mean debts due the insolvent, may, as I have shewn, be taken in execution.

No sensible reason can be suggested why this particular class of choses in action should have been deliberately exempted from the operation of section 2. I think, for the foregoing reasons they may properly be held to be within it, and am therefore of opinion that the appeal should be dismissed.

PATTERSON, J. A.—I agree that no good reason has been shewn for differing from the Court below upon any question discussed in that Court.

The point that book debts are not covered by the second section of 48 Vict. ch. 26, was taken for the first time in this Court.

I was for some time in doubt as to the proper construction to be given in that particular to the section, but I cannot say that I have now any doubt on the subject. Under the principle on which the Act of 13 Eliz. ch. 5, has been given effect to, as explained and illustrated in the chapter of *May* on Fraudulent Conveyances, in which the author treats of what property the statute applies to, I think book debts, being now exigible by means of attach-

ment for the payment of judgment debts, would be held to be "goods and chattels" within the meaning of that statute, and the language of our Act is at least equally comprehensive.

I therefore agree in dismissing the appeal.

HAGARTY, C.J.O.—I agree in the judgment of my learned brother Osler for the reasons stated by him.

I have only to add that, in my opinion, the strictest application of the *ejusdem generis* doctrine warrants his conclusion. The debts due to a man, whether they are called "book debts" or debts generally, are, I think, clearly of the same class of subject as his "bills, bonds, notes, or securities," and after such enumeration we find the words "or any other property, real or personal." We should hesitate long before declaring that the debts due a trader, possibly the largest and most valuable part of his assets are excluded from the operation of a statute clearly (as I think) designed to affect the debtor's property at large, and prevent a preferential or fraudulent application of it.

BURTON, J.A.—The only point apparently argued in the Divisional Court was the meaning of the words "in insolvent circumstances," in the 22nd Vict. ch. 96, and amendments, and I entirely agree with the learned Chancellor in the interpretation placed by him on the language of that Act, but I cannot agree in the judgment arrived at in the Court below, and in the direction contained in it that the defendants should account and pay over to the plaintiffs any moneys received or which but for the wilful default of the defendants might have been received by them.

I entertain a very strong opinion, for reasons which I shall presently give, that an assignment or transfer of book debts is not within sec. 2 of the statute, and as that point, though not argued in the Court below, was taken before us, we are driven to consider it, and if well taken it is fatal to the plaintiffs' right to recover.



Before considering that question, however, and assuming for the present that debts are comprised within the section, the decree is not, I think, sustainable.

The plaintiffs here had not obtained any lien or charge upon the property or any order which but for the assignment complained of could have been enforced against these debts, and I think I may safely say that no decision can be found where the Court has gone further in cases where the creditor has no appropriate charging order, than to set aside the deed. Having a judgment and a *fi. fa.* in the sheriff's hands does not assist the plaintiff, as he could not seize these debts. The most he or a creditor could do would be to apply for and, if the Court thought fit to grant it, obtain an attaching order. If he had obtained such an order, and was prevented putting it in force by the assignment, the Court might not only remove the assignment but make the order effectual. As it is the plaintiffs occupy no stronger or higher position than a creditor who has not obtained judgment, and if the deed is set aside there is nothing to prevent another creditor stepping in and garnishing the debts.

In granting that relief it would be on an amendment being made so as to make the action on behalf of all creditors, and following *Reese River v. Attwell*, L. R. 7 Eq 347, making no order as to costs. My own view is, however, that the transfer is not within the section, and that for that reason, and other reasons which I am about to point out, the action should be dismissed.

It seemed to be assumed upon the argument that before the passing of the 48 Vict. ch. 26 a transfer of debts by a person in insolvent circumstances was not within the statute, and if I had not been also of that opinion I should have desired counsel to argue it, and in the view which I take of the construction of the late Act I much regret that it was not fully discussed upon the argument.

As a general rule where the debtor is not dead, bankrupt or insolvent, the Statute of Elizabeth operated only upon property which was capable of being taken in execution.

Thus before the English Act, 1 & 2 Vict. ch. 110 copyholds were not within the Act, and an assignment, though voluntary, not void as against creditors.

So, also, a voluntary assignment of a chose in action was not fraudulent as against creditors, thus in *Norcutt v. Dodd* Cr. & Ph. 100, it was laid down by Lord Cottenham that an assignment of a chose in action was not within the Statute of Elizabeth, the debtor being still living.

The difficulty he points out under the Statute of Elizabeth was, that during the lifetime of the debtor creditors could not be said to be prejudiced by a voluntary assignment of a chose in action, inasmuch as that species of property was not subject to be taken in execution, but after his death it was otherwise, because then the creditors might reach all his personal property of whatever kind. And the same reason applies where the debtor becomes bankrupt, because under the provisions of those Acts all his property becomes applicable to the payment of his debts.

And so it has been held from time to time as different kinds of property have been made seizable under execution, that the provisions of the statute extend to them because the making a transfer of them may hinder or defeat a creditor coming with an execution.

But there is an important distinction to be borne in mind between an ordinary execution, under which the property could not be taken, and the statutory execution, so to speak, of bankruptcy, under which every description of interest of the debtor becomes bound.

The same rule has always prevailed with reference to the construction of our Statute, ch. 118, although the words there used, "goods, chattels, or effects," the same words as are used in the Statute of Elizabeth, are quite wide enough to include debts. But the Courts have, with one exception, to which I shall presently refer, construed it in the same way as the Statute of Elizabeth, with the simple addition of the prohibition of preferences.

Now in 1854, in England, and in 1856, in this Province, power was given to creditors to attach debts, but I am unable to find any authority for holding, with the exception of one case decided by the late Chancellor Spragge, that thereby property of this description was brought within the Statute of Elizabeth, and no such authority was brought to our notice. Nor have I been able to find anything in English text-books to countenance that view beyond a note in Mr. May's recent work, which does not refer to any decided case.

If the fact that creditors were thus given the power to reach this description of property had the effect of bringing it within the Statute of Elizabeth the plaintiff does not require the aid of 48 Viet.

Rightly or wrongly, I think the general view accepted and acted on in this Province has been to treat book debts as not within the Statute of Elizabeth, or ch. 118, and the reason probably of that construction is to be found in the fact that they are not exigible under any process as a matter of right. A judgment creditor, in order to obtain an attaching order, had always to make application to a Judge, and it was discretionary with the Judge to make or refuse the order, and if it appeared upon the affidavits that the debts had already been assigned the order was refused.

That eminent Judge Mr. Justice Willes, in *Hirsch v. Coates*, 18 C. B. 757 speaking of the garnishee clauses of the C. L. P. Act, says: "I think this statute must be construed like any other statute, giving the words their plain, ordinary, and proper sense. So construing it, I think it can only operate to give the judgment creditor the same degree of charge upon the debts which are the subject of the order as an assignment in bankruptcy would give, such as the judgment debtor was entitled to at law and in equity."

It is true that the debts, although not passing under an assignment in bankruptcy, might generally be reached under the fraudulent preference clauses of such an Act by the assignee, but in the absence of such clauses could a transfer of them be impeached at all.

If in such a case it is the duty of the Judge, as decided in *Hirsch v. Coates*, to refuse the order, how can they be reached, and how can they be said to be exigible in any way under execution ?

I quite agree that once the order is obtained and served, it is not possible on any principle to distinguish an execution of this kind against debts from an execution against goods and chattels. The debts having been assigned before the application to a Judge for an attachment, the Judge, upon such an application would have to refuse the order as was done in *Hirsch v. Coates*.

It may, perhaps, be said, that an issue might be directed to test the validity of the assignment, but the answer to such a suggestion appears to me to be this : such an assignment cannot be impeached as the subject of it is not seizable under execution, and it is not therefore fraudulent as against creditors. It is true if you had succeeded in inducing a Judge to grant an attaching order you might have made them available for the payment of your debt, but you have lost that opportunity and you are confined to the remedy given by that Act which enables you to garnish.

If the debts were not "goods and chattels" within the 13th Eliz. or under the old chap. 118, the assignment cannot be void as against creditors, and if not void under those Acts there is nothing else to make it void. The Common Law Procedure Act, does not make the transfer void, but merely gives the power to attach them if they still remain due to the judgment debtor. See *Sims v Thomas*, 12 A. & E. 536.

If this view be sound, and perhaps one very strong evidence of its soundness is to be found in the fact that neither in England nor here, with one exception, to which I have referred, has any one successfully attempted to impeach such a transfer, we may in it find the key to the recent legislation, and without much difficulty arrive at the conclusion that in that legislation it was deliberately intended to leave this description of property as it was, and to confine sec. 2 to the things which were strictly exigible under



execution ; whilst if an assignment were made under the Act for the benefit of creditors these debts as well as every other description of property would be available for the general benefit.

The relief given under ch. 118, was of an anomalous and defective character at best. The only effect of it was to postpone a creditor who perhaps had a meritorious claim to a preference, to another who had perhaps none. Even as the law now stands in the absence of a general assignment under the Act, the preferred creditor is deprived of his advantage for the benefit of a limited class only, that is to say, the execution creditor and those whose claims being overdue lodge their certificates within thirty days.

This is not a satisfactory state of the law, and was not what the Legislature by the recent Act was endeavoring to bring about, viz., an equal distribution of all the assets among all the creditors.

It being then understood that ch. 118 had been generally treated as extending only to personal property, and only to such personal property as could be reached by execution, and bearing also in mind that in case of death or bankruptcy, and in those cases alone this particular description of property could be reached ; what has the Legislature said in the new enactment ?

The 2nd section does not say, every gift, &c., of any real or personal property of every nature or kind soever ; but after using the same words as are to be found in the original statute, adds "shares, dividends, or bonus in any bank, company, or corporation," these being things made liable to execution since the passing of the former Act, and then adds the words, "or any other property, real or personal." These words, as regards personal estate, are no wider than the words previously to be found in the same section, and found as they are in juxtaposition with words relating to notes, securities, and stocks ought, according to the ordinary rules of interpretation, to be confined to things ejusdem generis as those just enumerated.

And there are, to my mind, many reasons to be found in the Act itself for holding that it was not intended to extend the scope of the section beyond those things which were exigible under execution. For, in the section which defines the form and effect of a general assignment, it gives the form and words which shall be deemed sufficient to pass all the real and personal estate of the assignor, beginning with all his "personal property which may be seized and sold under execution," and then adding, and all his "real estate, credits, and effects."

Such an assignment would embrace every description of property, and the Act then provides that no creditor shall sue for the rescission of deeds, instruments, or other transactions, but the right shall be exclusively in the assignee.

In other words, there is great force in the contention that it was not the intention of the Legislature, in section 2, to interfere with this description of property, but to leave it as it stood previously to its passage, so that a transfer of it could not be impeached by a creditor having an ordinary execution, whilst it endeavoured to place an assignment, executed according to the Act as nearly as possible, on the same footing as an adjudication in bankruptcy, and to vest in the assignee for the benefit of the creditors all the estate and interest of the debtor in every description of property, and the exclusive right to impeach such a transaction as the present.

In this view of the matter it is not necessary to express any opinion on the construction of the Act as to avoiding an assignment which has the effect of giving a preference or delaying creditors, though such a result may not have been intended.

Some judges have laid it down that all that is necessary to establish under the recent Act is the fact of insolvency and that the transfer has the effect of delaying creditors. If that be the true construction there is nothing more to be said. I have in another case given my reasons for dissenting from that view (*a*). But under the former

(*a*) *Kennedy v. Freeman*, ante p. 216.

Act it would have been very difficult to establish any participation by the defendant in any intention to defeat or delay creditors or to secure a preference for himself.

According to the evidence of Klœpfer, which is not contradicted, but is substantially the same as the debtor's, he did not wish to take an assignment of the debts, but desired the debtor to collect them himself; and although he knew of the plaintiff's debt he was told by the debtor he proposed raising money by mortgage on the house, and paying him, and the only other debt which he spoke of was secured; but for the absconding and default of the agent, with whom the books were left, it is by no means clear that there was not enough to pay every one.

If it is still necessary to shew an intent to act in fraud of the statute, participated in by both parties, I should be inclined to hold on this evidence that it was not made out; but upon the other point I am not satisfied that a transfer of debts is within the statute and so I am of opinion that the appeal should be allowed, and the action dismissed, but as the point was not taken in the Court below I think it should be without costs.

BURTON, J. A., dissenting.

*Appeal dismissed with costs.*

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## SHEARD V. LAIRD.

*Deed obtained by threats of legal proceedings--Undue influence.*

The defendant had become liable as accommodation indorser for the husband of one of the plaintiffs, who, with his wife, became makers of a joint note to defendant as security, and which it was agreed should be paid out of the proceeds of certain lands that had been previously conveyed by the husband to his wife. Instead of doing so, however, the husband sold the lands, and absconded, leaving his wife behind.

The defendant, on learning this, went to the wife in a state of excitement, threatened to aid in proceedings criminal as well as civil unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter.

This, the mother, after persuasion by the daughter, agreed to give the defendant, advising the plaintiff's legal adviser should not be consulted, and on the evening of the following day, a deed absolute in form, was executed by both the mother and daughter, the latter having dower in the land, in favor of the defendant, who, at the mother's request, gave a separate memorandum of defeazance. There had been no direct communication between the defendant and the mother; nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security.

In an action impeaching this deed as having been obtained by threats and undue influence, the trial Judge [Armour, C. J.] dismissed the action with costs, which judgment was set aside by the Divisional Court of the Common Pleas Division.

On appeal to this Court, the judgment of the C. P. D. was reversed, and the judgment of this trial Judge restored with costs.

THIS was an appeal by the defendant from the judgment of the<sup>7</sup> Common Pleas Division, reported 15 O. R. 533, and came on for hearing before this Court on the 13th and 14th of September, 1888.\*

*W. H. Bowlby*, for the appellant.

*C. A. Durand*, for respondents.

The facts are fully stated in the report in the Court below.

November 13, 1888. HAGARTY, C. J. O.—Nothing is more difficult than the attempt sharply to define what is “undue influence” or “coercion.” Both in the numerous cases and in the text books the difficulty is felt and expressed. *Kerr on Fraud* 158-9 may be referred to. It is thus expressed:

\**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



"No general rule can be laid down as to what shall constitute undue influence. The question is one which must in each case depend on its own particular circumstances. There is no head of equity more difficult of application than the avoidance of a transaction on the ground of advantage taken of distress. The case presents no difficulty where direct restraint, duress, or oppression can be shewn. The difficulty arises where the Court has to determine whether the advantage taken of distress amounts to oppression, or the influence exerted has been so pressing as to be undue within the rule of equity."

I have examined most of the authorities referred to by the text writer, and I quote his words as giving the fair general result.

There are a vast number of cases following the lead of *Huguenin v. Basely*, 2 White and Tudor's L. C. 636, as to undue influence in the cases of wills and voluntary settlements of property, of setting aside contracts for the purchase or the sale or exchange of properties, such as are described in our own Court of Chancery in *Waters v. Donnelly*, 9 O. R. 391-401.

Cases of deeds, &c., obtained for the compromise of criminal proceedings, or to save either the maker or some other person from criminal charges, such as are discussed in *Williams v. Bailey*, L. R. 1 E. & I. Ap. 200, and again in a recent case of *Lound v. Grimwade*, 59 L. T. N. S. 168 (a).

But I have not read or been referred to any case in any way closely resembling the present.

We have before us a deed executed with proper formal requisites, against which the grantor seeks to be relieved, on the equitable ground of its having been improperly and unfairly obtained from her. It was executed by her and her daughter, the wife of one Godbold, as security on property of the plaintiff, for a debt due by the daughter and her husband to the grantee. The husband had induced the defendant grantee to indorse a note wholly for his accommodation, which the defendant has had to pay. He pressed the husband for security. His wife owned certain lots, and to quiet him, she, in her husband's presence, gave

him her note for the amount. They then sold the lots promising to pay him from the proceeds. Instead of doing so the husband absconded, insolvent. Defendant applied to the wife, and used very strong language, threatening exposure, denouncing the husband in violent language, and as, she says, threatened to stir up a firm, of Gillard & Co. and one Irwin, to go on with some criminal proceedings which they had threatened as to former transactions with her husband; that he asked her for security, and whether her mother, the plaintiff, had not some property on which she could give security. Defendant admits that he told her that Gillard & Co. were talking of arresting him, as they afterwards did, in Detroit. She told this to her mother, the plaintiff, who consented to give the security. This was in the forenoon. About 7 p.m. defendant was informed that the security would be given. The plaintiff's deed was in the hands of Mr. Durand, a lawyer in the town, and defendant told her not to tell him the purpose for which they wanted it. It was obtained, and the deed in question was prepared at defendant's instance, and was executed the next evening in the presence of McGiverin, the subscribing witness, who proved plaintiff's execution, and that she was aware that she was giving security to defendant. Nothing was said in his presence of any threat or influencing motive.

There is no pretence of any communication between defendant and the plaintiff directly, all was through the daughter. The latter also executed the deed, to bar her dower in the land, as it had come to the plaintiff through the daughter's husband.

The deed is absolute in form, but there was a document signed then by defendant giving three years to redeem.

We therefore have before us a deed executed with all due formality. The burden of evading its operation is wholly on the plaintiff, the grantor.

The case was tried by Armour, C.J., without a jury. He held that the deed could not be impeached. That the parties fully understood what they were doing; that they

were giving security to defendant. That defendant had used angry, indignant and very strong language to the wife, and that he was fully justified in being very indignant, but not to plaintiff, nor was anything said to her, and a considerable time elapsed between the conversation and the giving the security; and on the whole my learned brother considered he would be acting wrongly if he set aside the deed, and he finds that "the whole thing was finally executed without threat, or undue influence, and without misrepresentation."

The Common Pleas Division has reversed the judgment, and directed judgment to be entered for plaintiff, thus setting aside the deed.

The general principles governing the intervention of a Court are fairly stated. Our learned brethren have satisfied themselves that the facts in evidence warrant and require their application to the present case, thus differing from the conclusions of the trial Judge.

I am unable to coincide in the very strong language in which the conduct of the defendant has been denounced. His position seems to be one hardly fairly considered. He, like the plaintiff, had, unfortunately for himself, become security for the husband, without any security. He was cruelly, I may add, shamefully deceived and ill-treated by the man he had trusted. His language was very strong, we may concede, far too strong and vehement, and his manner may be said to have "lacked the repose" that characterises a higher order of culture and refinement. But it was the true echo of his naturally indignant feelings.

It must be borne in mind that when his accommodation indorsement was maturing, or had matured, the wife had joined in her husband's note to him, and was equally his debtor.

It was not the case of an ordinary business debt, urged and pressed for with unseemly harshness. It was the claim of one who had voluntarily trusted parties by whom he was deceived. He pressed for security, and asked if the

plaintiff, his debtor's mother, could not give it. I suppose he thought that one of the family might more fairly bear the loss than that it should fall on him.

As to the alleged threat of criminal proceedings, there was nothing to shew that he claimed the power to institute them. The utmost extent of the alleged threat was that he would see Gillard & Co., or some other person, and help them all he could in some proceedings for some fraud of which they had complained. He asserted no power in himself to set the criminal law in motion. He had no communication whatever with the plaintiff. We may assume that the daughter communicated all his threats to her mother, and that it was in consequence thereof that the plaintiff resolved, however unwillingly, to give security on her property. Very few persons undertake such a liability except unwillingly and with much reluctance.

Now if the security had been at once obtained, the plaintiff's case would have presented a far stronger appearance. But we find that from ten or eleven in the forenoon of one day until seven o'clock in the evening of the next day, both daughter and mother had the amplest time allowed to reflect on and consider their position and the nature of defendant's demand, and the advisability of accepting or refusing it. They were living in a town where they had lawyers or friends to consult with, and nearly two full days allowed for the purpose.

Very strong remarks were made as to defendant's desiring the daughter not to tell Mr. Durand, with whom was the deed, the purpose for which it was required.

It may be noted that this took place about six o'clock on the evening of the first day when she told him her mother had agreed to give the security. She says: "He told us to get it from Durand and not tell him what we wanted it for. He said the deed would be much safer in his hands than in Durand's." She also says that she told him that she wanted him to keep it quiet. She says they went the next day and got the deed.

She had again ample time to consider all this.



Defendant's account is, that she wanted to have the whole thing kept quiet and done quietly, and that he thought Durand might have asked her not to give the security.

The plaintiff states that her daughter told her that he said if he did not get security he would publish him and her as liars and rogues in the papers here and in the States. He talked about having him shot. "He said he would have revenge, but I did not hear in what shape he would take revenge."

She said that on account of her daughter's health she had not the courage to refuse or contradict her.

McGiverin's account of the final execution of the deed is very clear, and is not contradicted. It appears from the wife's evidence that her mother required a writing or memorandum as to the time for redemption.

On the whole case I am of opinion that the decision of the learned Chief Justice who saw the parties and heard all the evidence should not have been interfered with.

I have already said that there was no material difference of opinion as to the general principles that govern cases like the present.

As is said by Lord Cranworth, L.C., in *Colclugh* (or *Boyse*) v. *Rossborough*, 3 Jur. N. S. 873, 6 H. L. Cas. 2, all these cases as to undue influence must resolve themselves into either coercion or fraud—actual violence would, of course, not be necessary—a person feeble in body, though not unsound in mind, may be influenced by conduct such as to excite terror to execute an instrument which, if he had been free from such influence, he would not have executed. He adds: "It is extremely difficult to state, in the abstract, what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads, coercion or fraud."

I can see no fraud in defendant's conduct. He was only seeking to get one of his debtor's family to become his security.

One question is then, was there undue influence which, as Lord Cranworth says, "cannot be presumed," and must be proved?

It is, of course, conceded that it was under the influence of defendant's urgent demand for security and his strong language and his threats of exposure, &c., that he obtained this security, but I fail to see, any more than the trial Judge could see, that the evidence here warrants the interference of a Court of Justice with the plaintiff's deed.

A large number—possibly the large majority of such securities by one member of a family for another—are entered into most unwillingly under the influence of a dread of or dislike to exposure of unpleasant details, or to save from ruin or despair an unfortunate or ill conducted relative.

I hesitate to interfere with a deed given like this where the amplest time had been given to the parties to discuss or to take advice on the propriety of acceding to a creditor's demand.

I think I am bound—as I feel that my Divisional Court brethren seem to have considered themselves to be bound—to take all this evidence as it strikes me to import and, especially when my opinion coincides with that of the trial Judge, to hold that the appeal should be allowed.

BURTON, J.A., concurred.

OSLER, J.A.—The question is, whether the plaintiff was a free and voluntary agent in doing what she did, and though I cannot say I am entirely free from all doubt on that point, yet upon the whole, I think the finding of the trial Judge ought to be restored. The plaintiff's act may perhaps be more properly attributed to the importunity of her daughter than to the overbearance of the defendant.

PATTERSON, J. A., having previously been transferred to the Supreme Court of Canada, gave no judgment.

*Appeal allowed with costs.*

## FOLLET V. TORONTO STREET RAILWAY COMPANY.

*Negligence—Damage by street car—Contributory negligence—Accident by carelessness of plaintiff.*

While a car of the defendants in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the plaintiff, whose carriage was waiting at the kerb stone, without observing the near approach of the car got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in charge in turning his horse off the track, the horse would have collided with the plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and the plaintiff thrown to the ground, and her leg was fractured.

In an action for damages the jury found in favour of the plaintiff, which verdict the Divisional Court refused to disturb. On appeal this Court [OSLER, J. A., dissenting,] being of opinion that there was no evidence of negligence on the part of the defendants, reversed the judgment of the Q. B. D., and dismissed the action with costs.

THIS was an appeal from the judgment of the Queen's Bench Division dismissing, with costs, the motion of the defendants to set aside the verdict and judgment in favour of the plaintiff at the trial, and to enter a nonsuit and judgment for the defendants; or for a new trial; under the circumstances stated in the present judgments, and came on for hearing before this Court on the 16th of May, 1888.\*

*Osler, Q. C., and Shepley, for the appellants.*

*Robinson, Q. C., and Fullerton, for the respondents.*

June 29th, 1888. HAGARTY, C. J. O.—It is abundantly clear that the street car was going at a very moderate pace; also that the plaintiff never took the trouble to ascertain if a car were approaching; that she pulled her horse and vehicle sharply across the track, that at the moment she did so the car was close behind her; so close and so sudden was her attempt to cross, and naturally so unlooked for by the car driver, that but for his

\**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

jerking his horse aside the animal must have struck her waggon. She had got her vehicle nearly across when something connected with the car—the whiffletree, as was suggested—touched the hind wheel and upset her.

That the careless driving of the plaintiff contributed to or rather caused the accident seems very plain. The well-known principle that, notwithstanding such conduct of the plaintiff, the defendants were bound to do all in their power by reasonable exertion to avoid collision is relied on by the plaintiff.

The occurrence resembles, in my mind, the case of say two vessels steaming close together in parallel lines. Suddenly, and without any warning, one of them crosses the bows of the other at almost a right angle. It is the duty of the other to do all that she reasonably can to avoid the collision, but with hardly a moment to decide on the course to be taken; she makes some slight miscalculation as to altering the course or reversing the engine, or as to which of these two things should be done first; the collision happens. I think it would require a very different state of facts to hold the original offender entitled to recover, even with the deepest respect for Mr. Davies's donkey, whose memory is embalmed in the delightful pages of 10 Meeson and Welsby.

We start in this case with the wholly careless act of the plaintiff crossing a track directly in front of a street car going very leisurely, so close that the horse had to be pulled off the track to avoid striking against her waggon. She never looks; she takes no precautions; and her right to recover has to be rested wholly on the opinion of a witness that it would have been better for the driver to have applied the brake before he jerked the horse off or simultaneously with doing so.

Where I think this case distinguishable from others is, that the collision is the direct and immediate result of the plaintiff's own carelessness. The highest ground on which her case can be put is this: "I carelessly drove across your track under the very head of your horse; but some people



think if your driver had been a little quicker in applying his brake I might have escaped unhurt; therefore you must pay my damages." I have seen no case in which such evidence, not shewing anything beyond a mere non-feasance or very slight error in judgment at the critical moment of danger, wholly produced by plaintiff's negligent act, the latter has succeeded in making out a *prima facie* case to submit to the jury.

The Lord Chancellor said in *Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. 41-46: "If there are two moving bodies which come in contact, whether ships or carriages, or even persons, it is not uncommon to hear the person complaining of injury describe it as having been caused by his ship or carriage or himself having been run into, or run down, or run upon; but if a man run across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished."

We might ask here whether the plaintiff ran against the car or the car ran against the plaintiff.

The usual course of proof is first to establish negligence on the defendant's part. Defendant answers this by shewing that the plaintiff's negligence substantially contributed to or caused the accident. To this the plaintiff replies: "But conceding my neglect, you could reasonably have avoided the result." It is in this that I see the distinction between this and the leading cases of *Davies v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 5 C. B. N. S. 740; and *Radley v. London and North-Western R. W. Co.*, 1 App. Cas. 754. Here we have no negligence proved in the first instance.

In the *Donkey Case* the plaintiff did not push or drive his tethered beast directly under the head of the fast driving defendant. In the *Radley Case* the plaintiffs did not push their loaded truck across the defendant's moving train. And in *Tuff v. Warman* it was the common contest between two approaching vessels as to keeping proper look out and porting of helms.

I fully value Mr. Robinson's argument as to the exigencies of street traffic and the crossing, &c., of the car tracks. It is at least as much the duty of the driver of a carriage not suddenly to turn at a right angle across the track without looking to see if a car were or were not within a few feet and a collision inevitable, unless avoided by very prompt and successful action of the driver.

The plaintiff's action was apparently careless of all risk, as if the leading idea was to cross with perfect indifference to ordinary precautions, and leave it to the street car to keep out of the way. On the principle of this verdict, if a man be running or walking rapidly along a street and another man, either through carelessness or drunkenness should stumble and fall right across his path, and the former in his surprise and haste runs unintentionally against the latter and injures him, he is to be held liable if some witness swore that in his opinion he could, by stepping more dexterously aside, or by jumping over the prostrate man, or by some other gymnastic effort, have avoided the collision.

Whatever sense of justice I possess is against permitting the success of such an attempt as the present to make one person pay all the damage sustained by another in consequence of that other's want of ordinary care.

BURTON, J. A.—In this case the plaintiffs seek to recover damages against the Street Railway Company for injuries caused by a collision between a car of the defendants and a covered buggy in which the female plaintiff was driving in endeavouring to cross their track.

Her account is that being on the south side of King street she looked up the track before she got into the buggy and saw no car coming, but as the cover of the buggy was up she could not see any approaching car after she was in it; she drove but a very few feet, and then endeavoured to cross and her buggy was upset from coming into contact with the front part of the car or the whiffletrees, the horse by which the car was drawn having either of its own

motion in order to avoid coming into contact with the plaintiff's vehicle, or from being turned by the driver, swerved to the north of the track.

That the car was being driven at a very slow rate is manifest from the fact that the buggy was not injured and from the fact that after the brake was applied it was stopped within four or five feet.

It is clear that the car was standing on the track but a very few feet in rear of the plaintiff's buggy when she got into it, and she is in this dilemma; either she did look and must have seen that it was close behind her, or she did not look and was guilty of reckless negligence in crossing the track without satisfying herself that she could do so in safety.

The driver of the car had, at the time of the accident, placed the reins for a moment or two in the hands of another servant of the defendants whilst he went to the rear of the car to remove some newsboys, but the jury in answer to the question submitted to them in the event of their finding negligence to state in what such negligence consisted omitted to point out any specific act of negligence contenting themselves with saying, "Incompetent driver."

From a careful perusal of the evidence, I should doubt whether there is any to support such a conclusion.

Two witnesses called for the plaintiffs prove, I think most conclusively, that but for the female plaintiff's own negligence the collision would not have happened. It appears from their evidence that after starting and proceeding for a very short distance westwardly along King street she crossed the rails at such a short distance in front of the car horse that it would have struck the buggy if the driver had not turned it off the track.

It is true that one of these witnesses took a very strong partizan view in favor of the plaintiff as will be seen from a short extract from the evidence. He is asked :

Q. She started up westward first and then turned towards the north? A. Yes most naturally the horse would start straight ahead.

Q. And then she turned northward rather sharply so as not to have her wheels running along the rails? A. Right across the track.

Q. And in doing that she ran into the street car horse?

A. No, I contend that the street car horse —

Q. In doing that she ran into the street car horse?

A. Well she did not run into the street car horse.

Q. The street car horse avoided the collision by turning out? A. Yes.

Q. She would have struck the street car horse, but for their swerving the horse to the north? A. She would not, the street car horse would have struck her buggy if he had not turned it out.

Q. She would have run her buggy against the street car horse if they had not swerved him out of the road?

A. No.

Q. That is what it amounts to of course? A. Well, you can have your view and I will mine, that is the difference of opinion.

Q. No it is not a difference of opinion, it is a question of what was done; if the street car horse had not been swerved to the north it would have collided with her horse or buggy, and you think with her buggy? A. I think so.

Q. You do not know when the brake was applied? A. No, I could not say about it. I saw the man have his hand on the brake.

The same witness admits that when the plaintiff started her horse the car was at the west side of Bay street; that she did not go any further distance westward along King street than was necessary to "start up her horse" and that she moved off at an angle, so that it is clear from the evidence of both these witnesses, that she attempted to cross so immediately in front of the car, that but for the car horse being turned to the right it must have come into collision with the horse or buggy of the plaintiff.

Now the first question is, was there any evidence of negligence on the part of the defendants; I must confess I can see none; it is not alleged that the car was being driven at an unusually fast pace, on the contrary it is admitted on all hands that it was being driven very slowly, a fact which, as I have shewn, is corroborated from the circumstance that the buggy was not injured by the collision.



Whether the man in temporary charge was competent or incompetent is not to my mind material as it is shewn that he was not driving improperly, and the car was so close to the plaintiff's buggy when she attempted to cross that in going that short distance the collision occurred, and would have occurred even sooner than it did had not the driver of the car turned his horse off the track to the right.

Is it open under such circumstances to draw any other reasonable inference than that the accident was caused by the gross negligence of the plaintiff herself, and from no other cause?

In the present case there is no breach of any statutory duty as the omission to whistle or the like. The Street Railway Company have the prior right of way along the streets; at the crossings or intersections of streets they are bound to the exercise of extra caution, but any person crossing at other places is bound to use reasonable care to ascertain that the line is free. In this case all the circumstances show that no caution whatever was observed on the part of the plaintiff; that she recklessly crossed without taking any pains to ascertain whether a car was near or not and brought the danger upon herself.

There being then no evidence, so far, of any negligence on the part of the defendants, and it being shown from the plaintiff's own evidence that the accident would never have occurred but for the negligence of the plaintiff herself, I fail to see what duty the defendants owed to this plaintiff, the breach of which would give her any right of action.

I quite admit that one party being at fault will not dispense with the other's using ordinary care, but no case of negligence on the part of the defendants in the management of their car has been established so as to make the question one of contributory negligence; the evidence establishes that the defendants' car was driven at a low rate of speed; does the plaintiff's conduct in crossing immediately in front of it throw upon the defendants a higher duty to herself to use reasonable care and caution than what they

owe to their own passengers and the public at large? I think no such obligation was thrown upon them; but if that had been properly an issue here, I think there was no evidence proper to submit to a jury that such reasonable care and caution was not used here under the circumstances as might have been expected.

A driver called upon by the misconduct of the party complaining to exercise his judgment might well be relieved from the consequences of any error in doing the proper thing at the precise moment to avoid an accident. There was no evidence in my opinion of any want of care amounting to negligence, even if that would entitle the plaintiff to recover for an injury primarily due to her own negligence.

I think, therefore, that the learned Judge at the trial, who evidently felt that the verdict should have been the other way, should have withdrawn the case from the jury; and I am the more confirmed in this view from a recent decision in England (17th of May) of the Court of Appeal, consisting of the Master of the Rolls, Lord Justice Lindley, and Lord Justice Bowen, in a case in which the circumstances were in many respects similar to the present, in which the learned Judge at the trial non-suited, but the Divisional Court reversed this decision, and ordered a new trial, but which decision was in turn reversed and a non-suit entered.

The case was *Allen v. The North Metropolitan Tramway Co.*, and the facts were these:

On a snowy night in December, about 11 o'clock, the plaintiff was in the Stratford High-street, on the Bow and Stratford bridge. He was about to cross the road, and had gone about two and a-half paces into the roadway when he was knocked down and run over by one of the defendants' tramcars proceeding to Stratford from London. His right leg was broken and he received other injuries, and for these he brought this action for negligence. At the trial which took place before Mr. Baron Huddleston and a special jury, the plaintiff admitted that he was not looking in the direction from which the tramcar came, and that if

he had looked he must have seen it. He said it was usual for the tramcars to stop on the bridge, and he expected that this tramcar would do the same. Upon this evidence Mr. Baron Huddleston had non-suited the plaintiff, but the Divisional Court considered that there was some evidence to go to the jury.

The Court took time to consider the judgment which was delivered by Lord Justice Lindley. Having carefully read the evidence through, they came to the conclusion that the view of Mr. Baron Huddleston was right. Upon the bridge where the accident happened the two tramway lines coalesced, and the plaintiff, when endeavouring to cross the road, looked only in one direction, and not in the direction from which the car was coming. The consequence was, that the plaintiff, after proceeding two or three paces, was knocked down by the tramcar, whether by the fore part of the car or by the horses was uncertain. There was some evidence that the car was going fast, and there was evidence that the plaintiff did not hear the car coming, owing, perhaps, to the ground being covered with snow. It was clear from those facts that the plaintiff had only himself to blame for the accident. In the first place the Court could hardly go to the length of saying that there was no evidence of negligence in the driver of the car, though that evidence was of the slightest possible character. On the other hand, there was clear evidence that the plaintiff's conduct caused the accident. He walked into the tramcar, when, if he had looked, he must have seen it. Then, even though the plaintiff was negligent, could the driver have avoided the accident by the exercise of reasonable care? They could find no evidence that the driver could have avoided the accident. The appeal must therefore be allowed, and judgment must be entered for the defendants.

I consider that a much stronger case than the one before us, in which I am unable to discover any evidence of negligence whatever on the part of the the defendants. I think therefore, the view taken by Sir Adam Wilson in the Court below was the correct one, and that the appeal should be allowed, and judgment given for the defendants.

PATTERSON, J. A., concurred.

OSLER, J.A.—I cannot concur in reversing the judgment below. That the plaintiff was guilty of some degree of negligence in crossing, as and when she did cross, may be conceded, although if the car was going as slowly as the defendants' witnesses say it was, the finding of the jury on that point is not indefensible, since the degree of care and prudence required of her must be measured by the distance at which she crossed in front of the car, and the rate at which it was going. For the slower the rate at which the car was going the less ground there is for imputing negligence to the plaintiff and denying her right to cross the street at the place where she did cross it. The meaning of the finding read in the light of the learned Chief Justice's charge is, that the plaintiff was not guilty of contributory negligence.

It has also been found that the defendants were guilty of negligence in having an incompetent driver in control of the car at the time of the accident. In one of the reasons of appeal it is said that this was not a sufficiently specific answer to the question, In what did the negligence consist? That is an objection which should more properly have been raised at the trial, when the jury might have been sent back or asked to explain their finding. We must assume now that every one understood what is manifest from the evidence and charge, that the incompetence pointed to by the answer was the inability of this accidental driver to do what the driver who was on the car and who ought to have been, but was not, in control of it, could have done, viz., swerve his horse and brake the car at the same time. Had *he* been at his post the accident in all human probability would not have happened.

He is asked :

Q. You have had a good deal of experience as a driver?

A. Yes, quite a bit.

Q. As a driver do you make a practice of stopping the car if you see a buggy cross the track in front of you? A. Well, in case of danger I always do.

Q. Would you have done so in this case? A. Certainly I would.



Q. Have you ever run into a buggy that has crossed before you? A. Well, I cannot say that I have; I have managed to keep clear of them.

Q. Can an experienced driver turn his horse and put on the brake at the same time? A. Well, as a rule you haven't to turn the horse.

Q. Can an experienced driver turn his horse and put on the brake at the same time? A. He can; I can turn the horse off the track, and put on the brake at the same time.

Q. Can you tell me in about what position the horse and buggy were, or did you see them when they were struck? A. The first I saw about it, as I told you before, I saw the car gradually brought to a standstill.

Reading this evidence, together with that of the want of skill and knowledge on the part of the person into whose hands the conduct of the car had been temporarily entrusted, it seems to me that there was evidence for the jury, (of the inference to be drawn from which, they, not the Court, are the judges,) of negligence on the part of the defendants, without which the accident would not have happened.

The recent case of *Allen v. The North Metropolitan Tramway Co.*, IV. Times Law Rep. 561, is clearly distinguishable, for the car in question there was going fast, and there was no evidence that the driver could have avoided the accident by the exercise of reasonable care.

The duty of the driver while driving in the streets of the city is, as was said by the Court in *Maugam v. The Brooklyn R. W. Co.*, 38 N. Y. App. 455.

"To keep entire control of his team as far as practicable, to be in a position to speedily apply the brake, and to be vigilant in observing the track, so as to enable him as far as practicable to avoid inflicting injury upon others."

I cannot hold that there was no evidence for the jury that this duty was neglected.

Wilson, C. J., in the Court below seems to think that there was no evidence that the actual driver was an improper one. If I thought so I should agree that the plaintiff could not recover, but when his qualifications and experience, as he himself describes them, are contrasted

with those of the person employed by the defendants, and who ought to have been at the brake, I neither wonder at nor dissent from the finding of the jury.

I am obliged to say that in my opinion the appeal should be dismissed.

*Appeal allowed with costs; and action dismissed with costs.*

OSLER, J. A., dissenting.

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### EMBURY V. WEST.

*Chattel mortgage to secure indorser—Relation back to prior agreement—Renewals—Assignments and Preference Act.*

A chattel mortgage to indemnify an indorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability.

The requirements of section 6 of the Chattel Mortgage Act, as to setting forth an agreement in the mortgage apply only to mortgages to secure future advances for the purposes therein mentioned.

In the case of a mortgage under that section as security against liabilities incurred by indorsing, or in any other way; all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mortgage, and shall be sufficiently described or identified therein.

The head note in *Barber v. McPherson*, 13 A. R. 356 corrected.

The reference in such a mortgage to a possible future renewal or extension of the liability which has not been agreed for and which the mortgagee is not bound to grant, does not invalidate the mortgage if in other respects sufficient.

THIS was an appeal by the defendant from the judgment of the junior Judge of the county of Hastings, pronounced by him on the 5th of March, 1888, in an interpleader issue in the County Court of that county, whereby a rule nisi obtained by the defendant was discharged, and the finding of the jury that certain goods and chattels were not the property of James Bird and Mary his wife, and not liable to seizure under defendant's execution against them was sustained.

The trial had taken place before the Judge of the County Court with a jury.

On the evidence there adduced, the jury found expressly, on a question put to them, that the chattel mortgage in question in the action had been made in good faith for the purpose of raising money to pay the creditors of the mortgagor (Bird), and that the money so raised had been applied for that purpose; and found, accordingly, a verdict for the plaintiff.

The learned junior Judge, in the course of his remarks, when disposing of the rule nisi, observed:

\* \* “1ST.—I do not find that Bird and his wife, the parties to the chattel mortgage, were insolvent within the meaning of the Act, and as the proceeds of the two notes indorsed went to pay off debts, I do not think the chattel mortgage void on these grounds.

“2ND.—As regards describing the notes and the objection as to interest, I am of the opinion that the statute is substantially complied with ‘Literal exactness in describing the indebtedness is not required, but it suffices if the description be correct as far as it goes, and be defined so as to direct attention to the source of correct and full information, without danger that the language used will deceive or mislead parties.’ See *Herman* on Chattel Mortgages p. 119, and cases cited.”

The appeal was heard on the 12th of September, 1888.\*

*G. T. Blackstock*, for the appellant.

*Aylesworth*, for the respondent.

November 13, 1888. OSLER, J. A.—The defendant is an execution creditor of James Bird and Mary Bird, under a chattel mortgage from whom, dated the 7th and filed 8th September, 1886, the plaintiff claims the goods in question.

The mortgage was given to secure plaintiff against liability upon two promissory notes which he had indorsed for James Bird’s accommodation to enable him to raise money to pay off two small judgments against him. The first note for \$192, dated 9th August, 1886, and the second for \$60, dated 16th August, 1886, payable respectively three months after date.

\* *Present*:—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

Before either of the notes fell due West recovered judgment against the Birds for \$486, which, with the exception of the costs, was secured and settled by a mortgage upon Mrs. Bird's farm, dated 18th September, 1886. The costs not having been paid an execution was issued therefor, upon which the seizure and subsequent interpleader proceedings took place.

At the close of the plaintiff's case several objections were taken to the sufficiency of the mortgage as a mortgage to secure indorsements within the Chattel Mortgage Act; and it seems to have been contended further that it was void "as preferring one creditor to another according to the statutes."

The learned Judge's charge is so badly reported that it is not easy to say with certainty how he submitted the case to the jury; but he does appear to have asked them to consider whether the mortgage was given for the purpose of defeating the plaintiff's claim, or whether it was made bona fide for the purpose of raising money to pay James Bird's creditors, and if the money was so applied.

The jury also seem to have been asked whether, taking into consideration this and other mortgages on Mrs. Bird's real and personal property, enough remained to meet West's claim. This, I presume, must have referred to the question whether Mrs. Bird, to whom the mortgaged property belonged, was solvent, as no objection was taken to the charge for mis-direction or non-direction on that point. Defendant's counsel objected that the Judge should have told the jury to find whether the mortgage had the effect of delaying West in obtaining his costs, and if so that it was void.

We may take the case as the parties chose to present it at the trial.

The evidence is amply sufficient to prove that the plaintiff indorsed the notes in question upon the express agreement that he should be secured for doing so by a chattel mortgage from Bird and his wife, and that the mortgage of the 7th September was given in good faith in pursuance



of and for the purpose of carrying out that agreement, and for no other purpose. Its bona fides is expressly affirmed by the jury, and the defendant did not suggest that it was not made in pursuance of the prior agreement, or ask the learned Judge to direct the jury to find specifically as to that. In the reasons for appeal it is urged that when the mortgage was given the mortgagors were insolvent, and that as it was not given for a present advance in money it is void. It is not, however, now to be assumed that Mrs. Bird was insolvent. The evidence admits of the opposite conclusion, which the learned Judge adopts in his judgment discharging the order nisi. It was for the defendant to make out the fact of insolvency to the satisfaction of the jury, and as he made no objection to the charge on this point it must be taken that he was satisfied with the way in which the learned Judge left it to them. But even if insolvency had been established I do not admit that the mortgage would be avoided by the Act relating to assignments and preferences by insolvents. I see nothing in that Act to justify the contention that a mortgage can no longer be taken under the Chattel Mortgage Act to indemnify an indorser; and if, as in this case, the notes were indorsed upon the faith of an absolute promise to give the mortgage, and it was afterwards given in good faith in pursuance of such promise, and before the maturing of the liability there being no evidence that it was purposely postponed until the mortgagors were in a state of insolvency, it relates back to the time when the liability was incurred, and cannot be deemed a preference in intent or in effect.

We are not now concerned with the effect of the Act upon a mortgage taken under such circumstances to secure an advance of money; and as regards a security of this kind at all events, I think the principle of the rule applies that when money is advanced upon the faith of an absolute promise by the debtor to give a chattel mortgage the sum advanced must be considered as a present actual advance upon the security of the mortgage. *Ex parte*

*Fisher*, L. R. 7 Ch. 636; *Clarkson v. Sterling*, in this Court (a), where many of the authorities are cited: *Ex parte Wilkinson*, 22 Ch. D. 788.

The mortgage is not, in my opinion, open to any objection under the 6th section of the Chattel Mortgage Act, either on the ground that the terms, nature, and effect of the agreement between the parties are not fully set forth, or that the liability extends for a longer time than a year from the date of the mortgage.

It is not a mortgage to secure future advances, but simply to indemnify the mortgagee against the indorsement of the two notes specified therein.

For that purpose an agreement in writing is not required by the 6th section. The agreement there spoken of is an agreement in writing to secure future advances, and it is the terms, nature, and effect of such an agreement and the amount of the liability intended to be created thereby which are required to be fully set forth in the mortgage taken as security.

The head-note in *Barber v. McPherson*, 13 A. R. 356, is quite misleading in this respect. The first paragraph would be more accurate if stated as a *semble*, and with the word "not" after the words "it is" in the first line.

The mortgage there in question was held to be invalid, because the liability it professed to secure was not that which existed when it was taken.

Having regard to the opinions expressed in that case by my learned brothers Burton and Patterson, I am content to acquiesce in that construction of the section expressed by the latter, agreeing with Harrison, C. J., in *O'Donohoe v. Wilson*, 42 U. C. R. 329, viz., that

"The requirements of sec. 6 as to setting out an agreement apply only to mortgages to secure future advances for the purposes described, and do not touch mortgages to secure against liabilities incurred by indorsing or in any other way."

This was, as I said, in *Barber v. Macpherson*, my own opinion of the meaning of the section, although I was reluc-

(a) Ante 234.

tant to urge it in opposition to previous decisions, more especially as the case did not call for a decision on the point. All that is necessary in the case of a mortgage under the 6th section to indemnify against an endorsement or other liability is, that such liability shall be one not extending for a longer period than one year from the date of the mortgage, and shall be sufficiently described or identified therein.

The mortgage in this case complies with both these requirements: the notes are specified with sufficient accuracy to identify them, and they both fall due within a year from its date. As to the objection that renewals of the notes appear to be contemplated which may extend the liability beyond the year, I repeat what I said in *Barber v. McPherson* to a similar objection, viz., that I am unable to comprehend how a reference to a possible future renewal which had not been agreed for, and which the parties were not bound to make, can invalidate a security in other respects sufficient.

I think the appeal should be dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

PATTERSON, J. A., having previously been transferred to the Supreme Court of Canada, gave no judgment.

*Appeal dismissed with costs.*

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# REDDICK V. SAUGEEN MUTUAL FIRE INSURANCE COMPANY.

*Fire insurance—Statutory conditions—Additional conditions—Title—Physical risk—Moral risk—Agent filling up application.*

The defendants, in the prescribed manner, indorsed upon the plaintiff's policy as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for \$1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favor of his father. The omission was not explained, but it was not attributed to any fraudulent intent.

The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition, or the above addition thereto.

The jury found that the existence of the annuity was not material to be made known to the defendants.

*Held*, affirming the judgment of the Q. B. D.: (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one because it was not limited to such facts or matters as were material to be made known to the company. (3) That the Divisional Court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial.

In the statutory declaration proving the claim under the policy the plaintiff said nothing of the annuity in favor of his father. Defendants failed to prove, and the jury were not asked to find that the declaration was fraudulent in this respect.

*Held*, no defence under the 15th statutory condition.

*Mason v. Agricultural Ins. Co.*, 18 C. P. 19, followed.

*Semle*, the first statutory condition applies to matters of title or incumbrances, or relating to the "moral" as well as the "physical" risk where the policy is based upon an application in which the insured is interrogated as to such matters.

*Klein v. The Union Fire Ins. Co.*, 3 O. R. 234, approved and distinguished.

On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling house, thereby contracting with the defendants that it was so occupied; whereas, in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance the risk never attached. On the pleadings and at the trial this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and that the application for the substituted



policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked for, and had told him that the building was then unoccupied.

*Held*, that under the circumstances, the knowledge of their general manager was the knowledge of the company; that the misdescription was immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground, and set it up as a warranty or part of the contract.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 14 O. R. 596, where the facts giving rise to the action are fully and clearly set forth, and came on for hearing on the 11th September, 1888.\*

*McCarthy*, Q.C., and *W. H. Kingston*, for the appellants. According to the proper construction of the first statutory condition, the concealment of any mortgage or other incumbrance material to be made known to the company will avoid the policy; and it is clear that this must be so, otherwise the company will be unable to judge of the risk it undertakes, and that condition is not limited to the physical risk as held by the Divisional Court. We contend that the addition to that condition was just and reasonable; but if otherwise, still we submit it was not open to the Court to set it aside on the state of the pleading, especially as no such contention had been raised at the trial, nor was the Judge at the trial asked to rule upon it. All these provisos must be read in connection with the wording of the first condition covered by the general proviso that such concealments or omissions must be material to be made known to the company, and under any circumstances we insist that in any event the verdict should have been set aside, and a new trial granted.

*Guthrie*, Q. C., and *J. B. Clarke*, for the respondent. Only the physical risk is embraced in the first statutory condition, and that condition cannot be held to apply to matters of title or incumbrance. It is only when the company is prejudiced by any misdescription, or when the matter so misrepresented or omitted to be communicated is material to be made known to the company to enable

\* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

it to judge of the risk it undertakes, that the policy will be deemed voidable. The omission to communicate the comparatively insignificant charge in favor of the plaintiff's father was not attempted to be shewn to have prejudiced the company to any degree; neither was it shewn that it was a matter material to be made known to the company in order to enable them to judge of the risk. The defendants went to the jury on that point, and the jury found against them. The addition to the first statutory condition provides that the policy shall be void if the application for insurance contains any false or incorrect statement respecting title or ownership, or the concealment of any mortgage, execution, or incumbrance. This addition is unjust and unreasonable in not providing that the false or incorrect statement or the matter concealed should be proved to be prejudicial to the company or material to be made known to them; and this addition was not relied upon by the defendants at the trial, but that point was first raised before the Divisional Court; and we submit that the Divisional Court had jurisdiction to hold the same to be not just and reasonable. There is no evidence of intention or design on the part of the plaintiff to conceal the charge in favour of his father, and the finding of the jury negatives the charge of fraud or injury to the defendants thereby; in short, the term "concealment" in the added condition means fraudulent, intentional, or designed concealment.

*Klein v. The Union Ins. Co.*, 3 O. R. 234; *Sauvey v. The Isolated Risk Ins. Co.*, 44 U. C. R. 523; *Samo v. The Gore District Mutual Ins. Co.*, 1 A. R. 568; *Wilby v. The Standard Ins. Co.*, 3 O. R. 115; *Sinclair v. Agricultural Mutual Ins. Co.*, 18 C. P. 19; *Butler v. The Standard Ins. Co.*, 26 Gr. 341; 4 A. R. 391, were, amongst other cases, referred to.

November 13, 1888. OSLER, J. A.—Having regard to the pleadings and the course taken at the trial, the case hardly calls for discussion of the question so much pressed

upon us in the argument of the appeal, viz., whether matters affecting the title to the insured property or the incumbrances thereon are within the scope of the first statutory condition, in other words, whether the risk referred to in that condition is the physical risk—the danger from or exposure to arson. I agree that the condition may, to some extent, be limited to the former, where there is no express stipulation or representation in the application, but speaking generally, where the policy is, as in this case, based upon an application containing statements or representations relating to matters as to which the company have thought proper to require information, the condition must be taken to refer to such statements and representations, whether the risk they relate to is the physical risk or the moral risk. I see no difficulty in thus applying it, and do not regard the case of *Klein v. The Union Ins. Co.*, 3 O. R. 234, as laying down a different rule. There the company had entirely dispensed with applications and interrogatories, and no representations had been made to them by the insured. Where no inquiry is made by the company it is not necessary for the insured to say anything about his title, or the incumbrances on the property. He must be interested in it, but he is not bound to disclose the particular nature and modifications of his interest.

In the present case the defendants have no doubt required that the applicant shall state the incumbrances on the property insured, but they do not set up the first statutory condition as avoiding the policy by reason of their non-disclosure. Even if they had done so the question would be, under the express qualification of that condition, whether the charge or incumbrance created by the annuity in favor of the plaintiff's father was in fact material to be made known to them in order to enable them to judge of the risk they undertook.

That was a question for the jury, and it was so left to them by the learned Chief Justice just as if the statutory condition had been pleaded, and it is disposed of by their finding in favor of the plaintiff.

The non-disclosure of the alleged incumbrance is, however, pleaded by paragraph 10 of the statement of defence as a breach of the condition made by the defendants to the first statutory condition, and which is expressly directed to the risk supposed not to be covered by the latter.

This added condition provides *inter alia* that (a) any fraudulent misrepresentation in the application; or (b) any false or incorrect statement respecting the title or ownership of the property or the circumstances of the applicant; or (c) the concealment of any mortgage or execution, or any incumbrance on the insured property, or on the land on which it may be situate, shall avoid the policy unless the directors see fit in their discretion to waive the defect. It is then alleged that in his application plaintiff caused the building and land to be represented as incumbered by a mortgage for \$1,500 only, whereas they were then also charged with the annuity referred to, whereby the plaintiff made a false statement respecting the title or ownership of the property, or concealed an incumbrance thereon within the meaning of the condition.

In the 4th reason of appeal it is urged that the added condition is to be read in connection with its principal, and is subject to the qualification therein expressed that the misrepresentations and omissions provided against must relate to matters material to be made known to the company. If this be the proper construction, the defence under the added condition, fails, because the finding of the jury is against the materiality of the concealed incumbrance as a thing which ought to have been communicated to the defendants.

The 11th paragraph of the defence pleads the representation as to incumbrances as a misrepresentation of a material fact, and relies upon it as avoiding the policy apart from the condition. The verdict of the jury of course disposes of this defence also.

The question of its materiality seems to have been the only one raised at the trial in reference to the incumbrance



I do not see that any objection was taken as to the annuity not being an incumbrance, (see *Mason v. Agricultural Ins. Co.*, 18 C. P. 19, and *Goring v. Insurance Company*, 10 C. R. 236, where the incumbrance omitted to be stated was of a similar character), or as to the justice and reasonableness of the condition, but in the Divisional Court the defendants moved for judgment on the ground (*inter alia*) that paragraph 10 of the defence was proved as pleaded, relying upon the bare non-disclosure of the annuity, without reference to its materiality, as being a concealment of an incumbrance within the meaning of the added condition. Whether the fact concealed was material or not is no part of that defence, and therefore the question whether the condition, so far as it is relied upon, is a just and reasonable one, thus, for the first time, came up for decision.

The defendants say it should have been raised at the trial and decided by the trial Judge, but it was, within the plain words of the statute, a matter to be determined by the Court to which it was presented, and there was no remaining question of fact connected with it which made it necessary to direct a new trial in order to dispose of it.

Assuming that the mere non-disclosure of the incumbrance is equivalent to the concealment of it within the meaning of the condition, (and I see no reason to differ from the Court below on that point, the existence of the charge being in fact known to the applicant,) I agree that the third branch of the condition (the only part of it we are now concerned with) must be regarded as not just and reasonable, because the condition fails to provide that the matter concealed should be something prejudicial to the company or material to be made known to them in order to enable them to judge of the risk. There can be no reason for making such a condition more onerous than the statutory condition, as the matters misstated or concealed as to the applicant's title or incumbrance on his land may be of the most trifling nature: *Butler v. Standard*, 26 Gr. 341; 4 A. R. 391.

I have already said that the materiality of the fact concealed from the defendants in this instance has been negatived, and it is difficult to believe that if its existence had been disclosed it would have influenced their action.

A further defence relied upon is fraud or false statements in the statutory declaration of loss by omitting to mention therein the incumbrance in favor of the plaintiff's father. The jury were not asked whether the omission was fraudulent. I see no reason for thinking that it was, and the case of *Mason v. The Agricultural Mutual Ins. Co.*, 18 C. P. 19, in this Court is conclusive that if not fraudulently false such a statement in the statutory declaration of loss cannot vitiate the claim.

The same observation applies to the defence founded on another statement in the statutory declaration "That the property insured belonged at the time of the fire solely to the insured, and that no other party was interested therein." That this statement was not intended to be taken literally is shewn by the reference to the mortgage of \$1,500 in a previous paragraph of the declaration, and it is alleged to be falsified by reason merely of the non-disclosure of the annuity which the plaintiff very probably never thought of as being an incumbrance upon the land.

The only other objection to be noticed is one which was taken for the first time during argument of the appeal, viz., that by the application the plaintiff described the building as being occupied by himself and his tenants as a dwelling house, and thereby contracted with the defendants that it was so occupied, whereas in fact it was at the time vacant and unoccupied: that there was thus an entire misdescription of the subject matter insured, and so the risk never attached.

This misdescription is pleaded in paragraph 4 of the defence simply as avoiding the policy under the first statutory condition, which is set forth; "and the plaintiff thereby caused the building to be described otherwise than as it really was, to the defendants prejudice, or misrepresented or omitted to communicate a circumstance which was

material to be made known to the defendants in order to enable them to judge of the risk they undertook."

To this it is replied in substance that the plaintiff made his application for insurance at the head office of the defendants, to one Drake, their general manager, and chief executive officer: that he gave Drake all the information he asked for, and told him that the dwelling-house was unoccupied: that Drake filled up the application, which plaintiff signed without reading it, and was not aware until after the loss that it contained any incorrect statement.

The question thus raised was the only one raised at the trial in reference to the misdescription. It was left to the jury by the learned Chief Justice as a question of fact depending upon the view they took of the evidence of Drake, and of the plaintiff, and the documents produced; and they found, as I think upon amply sufficient grounds in favor of the plaintiff.

The policy was taken in substitution of an existing policy in the defendant company, during the currency of which the premises had become vacant, and under which they were then insuring them as such, written notice having been given to them thereof in accordance with the terms of the policy. No reason was suggested why the plaintiff should have described the premises as being occupied, contrary to the fact, and the strong probability is that Drake in filling up the form of application carelessly omitted to strike out the printed words "and occupied by," or omitted to confine their operation to the other premises mentioned in the application and insured by the same policy.

It must now, at all events, be taken upon the finding of the jury that the defendants' general manager had notice at the time of the application, and in the course of the transaction, that the dwelling house was unoccupied, and as the defendants rested their defence entirely upon the materiality of the misdescription and not upon a warranty of its truthfulness or condition or stipulation that the policy should be avoided if it was not absolutely correct,

the question is to be judged of by their knowledge of the facts when they accepted the risk and issued the policy. The knowledge of their manager acquired under such circumstances was the knowledge of the company: *Shannon v. Gore District Ins. Co.*, 40 U. C. R. 188; 2 A. R. 396; *Shannon v. Hastings*, 2 S. C. R. 394, 410.

The statement in the application that the building was occupied, therefore became immaterial. It was not a description of it otherwise than as it really was to the prejudice of the company, and the defence as pleaded was disproved: there was no objection to the charge, and the verdict on this issue was not challenged in the Court below.

Having thus rested their defence throughout wholly upon the statutory condition and the materiality of the misrepresentations, it is not now open to them to shift their ground by setting up a contract for the absolute truth of the statement.

For these reasons I think we should dismiss the appeal.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

PATTERSON, J. A., having previously been transferred to the Supreme Court of Canada, gave no judgment.

*Appeal dismissed with costs.*

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RE OSTROM AND THE CORPORATION OF THE  
TOWNSHIP OF SIDNEY.

*Municipal corporations—R. S. O. ch. 184, sec. 546—Notice of by-law to open road—Computation of time—Quashing by-law.*

The Municipal Act, sec. 584, enacts that no council shall pass a by-law for establishing a public highway until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, &c.

The defendants on the 29th of July, 1887, published notices of their intention to pass a by-law on the 29th of August, 1887, to open a road across nine lots in the first concession of the township. On that day the council met and passed a by-law establishing a road across four only of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on shewing cause to the motion to quash the by-law.

Nothing had been done under the by-law.

*Held*, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last days, and, therefore, that a notice on the 29th of July of intention to pass a by-law on the 29th of August was insufficient.

Authorities as to computation of time in such a case considered.

*Laplane v. Peterborough*, 5 O. R. 634; *Wannamaker v. Green*, 10 O. R. 547, approved.

*Quære*, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice.

*Baker v. Saltfleet*, 31 U. C. R. 386, referred to.

Judgment of the Court below reversed.

THIS was an appeal from the judgment of Mr. Justice Street, discharging an order nisi to quash a by-law for opening a road, reported 15 O. R. 43, where the facts are fully stated, and came on for hearing on the 20th September, 1888.\*

*Aylesworth* and *Wallbridge*, for the appellant.

*Clement*, for the respondents.

November 13, 1888. OSLER, J. A.—The by-law was passed 29th August, 1887. It enacts that a road shall be opened, forty feet in width, commencing at the west end of a road called the Doxtator road, and thence westerly along the south side of, and immediately adjoining the Grand Trunk Railway line, across lots 27, 26, 25, and 24,

\* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

in the first concession of the township. It provided that the road should be opened and established as a public highway across lot 27, and the east half of 26 on the 1st of December, 1887, and across the remaining lots on the 1st December, 1888.

Notices were put up and published on the 29th of July of the intention of the council to pass the by-law on the 29th of August. In these notices the proposed road is described as also crossing lots 23, 22, 21, 20, 19, and a part of lot 18.

The permission of the council to lay out the road forty feet in width instead of the statutory width of 66 feet was not obtained until after service of the order nisi.

The by-law was moved against on several grounds, among others, (1) That notice of intention to pass it was not given one month previously to the passing thereof; (2) That the notices posted up and published were of an intention to establish and open up a longer and entirely different road from that described in the by-law; (3) That the by-law was passed to serve the private interests of some property holders in the locality, and not in good faith for the general benefit of the public.

The learned Judge refused to quash the by-law, holding that the circumstances disclosed in the affidavits removed any suspicion that it had been passed to serve private interests. That the variance between the petition and notices, and the by-law, as to the length of the proposed road was not a fatal objection being covered and overruled by the decision in *Baker v. Saltfleet*, 31 U. C. R. 386; and that although the notice seemed to be insufficient under the statute he would not on that ground alone quash a by-law, good upon its face.

These objections with others were renewed before us on the argument of the appeal, and are now so far as necessary to be considered.

It appears to me, with great respect for my learned brother Street, that the objection to the sufficiency of the notice is a very formidable one, and one which when clearly made out the Court is bound to give effect to.

It is essential to the validity of a by-law establishing or stopping up a road, by which the property of private persons may be compulsorily taken or the rights of the public extinguished, that the provisions of the statute under which it is passed shall be strictly observed.

Of this rule the case of *Cubitt v. Maxse*, L. R. 8 C. P. 704, is a strong illustration. The question there was whether a highway had been duly established under the provisions of the General Enclosure Act, 41 Geo. III. ch. 109, sec. 8, which enacted that before proceeding to make allotments of "common lands" the commissioners were to set out and appoint the roads and highways over the lands intended to be allotted and enclosed, and to prepare and deposit with their clerk, for the inspection of all persons concerned, maps, &c., describing such intended roads, and thereafter to give notice in a newspaper, and also by affixing it upon the church door of the parish of their having set out such roads, &c., and to appoint a meeting, at which any person injured or aggrieved by the setting out the roads should attend, &c.

There was no evidence that any notices had been given or any meeting held. It was held that the defendants having failed to prove a compliance with the provisions of the Act, had failed to prove a plea justifying the alleged trespass in exercise of a right of way.

Brett, J., in giving judgment, cites from 2 Sm. L. C., 6th ed. p. 144, the following passage: "A highway is sometimes created by Act of Parliament passed for that purpose. The provisions of such an Act must be strictly followed or the creation will not take place," and he adds: "That seems to me to shew that in order to prove a public way created by Act of Parliament it is necessary to shew that the provisions of the Act have been strictly followed."

The language of our Act is even more imperative and absolute than that of the Act in the case just referred to.

"No council shall pass a by-law for \* \* stopping up any original allowance for road or for establishing, opening, or stopping up, \* \* any other public highway

*until written* or printed notices of the *intended by-law* have been posted up one month previously in six of the most public places in the immediate neighborhood of such original allowance for road, street, or other highway": Municipal Act R. S. O., 1887, ch 184, sec. 546.

Of the original enactment, sec. 192, 12 Vict. ch. 81, Sir John Robinson said in *Lafferty v. Wentworth*, 8 U. C. R 232:

"I consider that we must pronounce any by-law to be illegal, and quash it as such, which has been made in such a manner as it is enacted by that clause it shall not be lawful for any municipal corporation to make a by-law, and this applies to the fact of notice."

In *Birdsall v. Asphodel*, 45 U. C. R. 149, a by-law to close a road was quashed where the notice of the intention to pass it had omitted to state the day on which the council were to consider it. It was held that "one month previously" must mean previous to some named time, coupled as it is with the duty of hearing parties petitioning to be heard.

In *Laplante v. Peterborough*, 5 O. R. 634, a similar by-law was quashed on the ground that one month's notice of its passing had not been given. Notice on the 28th March for the 28th April was there held insufficient.

In *Wannamaker v. Green*, 10 O. R. 457, the plaintiff relied upon a by-law purporting to close up a road and to vest it in him in consideration of his having dedicated a new road in lieu thereof. It was held that publication and posting of notice of the intended by-law were conditions precedent to its validity, and that proof of their due performance was essential to enable the plaintiff to recover.

*Lafferty v. Stock*, 3 C. P. 1, is to the same effect. Per Macaulay, C. J., "Although, therefore, this Court will not (when this by-law is assailed and sought to be quashed) presume the notices were not given, yet when it is advanced as a valid by-law, the existence of the facts, without which it could not be valid, should be averred."

*Winter v. Keown*, 22 U. C. R. 341. Ejectment for allowance for road alleged to have been duly stopped up by by-



law. The present Chief Justice of this Court said, "I agree with the Chief Justice (McLean, C. J.) in holding that it was necessary to give some evidence of the statutable notice having been given. The Legislature has given a certain power to the municipality, and it seems to me that such a power must be strictly executed."

In many of the reported cases the Courts have refused to quash the by-law, on motion, because it had not been made to appear clearly that the requisite notice had not been given and they would assume nothing against its validity. *Ianson v. Reach*, 19 U. C. R. 591; *Stanley v. Roper*, 17 U. C. R. 69.

Here it appears on the face of the by-law, and is admitted by the affidavit filed by the defendants in shewing cause to the motion, that the notice was not posted up until the 29th of July. If that was not a month previous to its passing, the by-law should have been quashed, since there was an entire absence of any of the considerations which have sometimes induced the Court to refuse to interfere summarily.

The motion was promptly made; nothing had been done under the by-law, and its illegality is manifest. In such circumstances the proper course is to quash the by-law at once, and prevent expense and future litigation. *Mace v. Frontenac*, 42 U. C. R. pp. 87-88.

The defendants' contention that it could be properly passed on the 29th of August, cannot prevail, for the day on which the notice was given being excluded, in accordance with the general rule in such cases, the 29th of August was the last day of the month,—the whole month—which was required to elapse before they could enter upon the business of passing it. Some of the cases upon notice of action are in point, as for instance *Freeman v. Read*, 4 B. & S. 174, where the notice was given on the 28th of April and the action was brought on the 29th of May.

It was held that the action had not been brought too soon, and the reasoning of Cockburn, C.J., and Blackburn, J., shews that it could not have been properly brought sooner. The latter says :

“It has been well settled that the calendar month required by statute begins at midnight on the day on which the notice was given, and generally ends at midnight of the day with the corresponding number of the next ensuing month in the calendar. I think the plaintiff had a right to commence his action on the 29th May, for that would give the defendant one clear calendar month’s notice.”

*Young v. Higgon*, 6 M. & W. 49, is a similar case. There it was held that the action had been brought prematurely, the notice having been served 26th March, and the writ sued out on the 26th April. It was said to be settled in accordance with reason and good sense, that in such cases the day from which the computation was made is to be excluded, “on the simple principle that where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded in order to ensue to him *the whole* of that space of time.” Here the defendants are to give notice a certain time before a particular act, the act, namely, of passing the by-law, can be done by them.

That notice is to be given in the prescribed manner to the persons who may be prejudicially affected by the act, in order, it may be supposed, to enable them to deliberate upon the course they will adopt in reference to it and unless both the first and last days are excluded they do not get a whole month for that purpose.

It was urged that the month should be computed from the time of day on which the notices were posted to the time of day on which the by-law was passed. No authority was cited for that, and the general rule is, that except when it is necessary in order to settle which of two acts *done on the same day* is to prevail, the law takes no notice of part of a day.

The cases of *McIntosh v. Vanderburgh*, 8 U. C. R. 248 ; *McCrea v. Waterloo*, 26 C. P. 431 ; *Reg. v. Aberdare Canal Co.*, 14 Q. B. 854 ; *Reg. v. Justices of Shropshire*, 8 Ad. & El. 173, may be referred to. Also, *Migotti v. Colvill*, 4 C. P.

D. 233, where the question of computation of time in the case of imprisonment under a conviction is considered.

As I think the appeal should be allowed for the foregoing reasons, it is not necessary to examine the other objections which have been urged against the by-law. They are sufficiently serious to prevent any feeling of regret that it should be necessary to quash it on the apparently narrow ground that the notice of intention to pass it was one day too short.

HAGARTY, C. J. O., and BURTON, J.A., concurred.

PATTERSON, J.A., having previously been transferred to the Supreme Court of Canada, gave no judgment.

*Appeal allowed with costs.*

[Since carried to Supreme Court.]

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## RYAN V. COOLEY.

*Will, construction of—Vested interest—Contingent interest—Maintenance.*

The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which otherwise would have gone to his, her or their parent." The will also directed the said four children should be maintained and educated out of the income of such property during their minority, and the surplus to be invested during such their minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one to divide the personal estate, share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, &c. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands.

*Held*, (1) [affirming the judgment of the Court below], that one of the sons, who had attained twenty-one, was not entitled to maintenance out of the estate.

*Held*, (2) [varying the same judgment], that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue.

THIS was an appeal from the judgment of Mr. Justice Ferguson, by Peter James Cooley, one of the devisees named in the will of the testator, Samuel Cooley, reported 14 O. R. 13, and came on for hearing on the 9th and 10th of February, 1888.\*

*Clute*, for the appellant.

*J. K. Kerr*, Q. C., for infant devisees.

*Lash*, Q. C., for other parties.

The facts appear in the former report and in the present judgments.

March 6, 1888. PATTERSON, J. A.—Upon the question of the vesting of the residuary real estate, I am unable to adopt the opinion of the learned Judge.

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



There are four children named—Peter, John, Samuel, and Mary—which number might be increased by the birth of a posthumous child. That event would not have affected the construction of the devise which would be the same whether its objects were four children or five.

I understand the view of my brother Ferguson to be, that the devise should be read as a devise to a class, viz., the children, other than those specifically provided for in the earlier part of the will, who should be alive when the youngest attained twenty-one, and the issue of such as should in the meantime have died.

I do not perceive any necessity for resorting to such a construction of the will.

The devise is not, as in most of the cases, a devise in trust for the children, when they attain twenty-one, or provided they attain twenty-one, other provisions being made for the disposition of the property, or of the rents and profits in the mean time.

The executors are to hold in trust for the children “until they or the survivor or survivors of them have attained the age of twenty-one years.” The trust is from the very first for the children. When they have attained twenty-one, the executors are to make partition among them, and the trust is to cease. Until that time they have the equitable estate only; from that time forward they have the legal estate, and have their respective shares in severalty.

Unless there is something else to qualify the devise, it is, in my opinion, an immediate devise of the beneficial estate to the four named children, subject to be defeated, as to any one or more of them, upon the condition subsequent of death before the time of partition leaving issue. In that event the share of the deceased goes over to the issue. See *Edwards v. Hammond*, 3 Lev. 132; 1 B. & P. N. R. 324*n*; *Doe d. Hunt v. Moore*, 14 East. 601; *Browne v. Lord Kenyon*, 3 Madd. 410; *Belk v. Slack*, 1 Kee. 238, besides numerous cases respecting legacies of personal estate, from *Colberry v. Lampen*, 2 Ch. Cas. 155, to *Fox v. Fox*, 19 Eq. 286.

The devise being thus direct, and giving *primâ facie* a vested interest, we do not require to seek for something in the other provisions fitted to turn the scale in favour of vesting, as in cases, of which *Fox v. Fox*, is an example, where the devise or bequest was to the parties as and when some event should happen. But we must see whether there is anything in the other provisions which shews that our reading of the devise does not correctly interpret the will of the testator.

The question whether a devise or bequest was vested or contingent has, in many cases, turned upon the testamentary directions concerning the rents and profits of the land devised, or the interest of the fund bequeathed. *Fox v. Fox* was one of those cases. Sir G. Jessel, M.R., there quotes the language of Lord Cottenham, in *Watson v. Hayes*, 5 My. & Cr. 125, 133, where the Lord Chancellor said :

“ It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest, which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. \* \* It is, therefore, the giving of the interest which is held to effect the vesting of the legacy, and not the giving maintenance ; but when maintenance is given, questions arise whether it be a distinct gift or merely a direction as to the application of the interest ; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.”

In *Fox v. Fox*, the gift was not a gift absolutely of the whole interest for maintenance, but there was a discretionary power to apply the whole interest or so much thereof as the trustees should think proper. The Master of the Rolls citing *Harrison v. Grimwood*, 12 Beav. 192, as a distinct authority, held that a gift contained in a direction to pay and divide amongst a class at a specified age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so, because there is a discretion conferred on the trustees to apply less than the whole income for that purpose.

The executors are to provide for the maintenance, support, and education of the four children, during their minority :

“ Out of the income to be derived from time to time out of my real and personal property not otherwise devised and bequeathed by this my will.”

By the earlier part of the will the testator had devised absolutely to a married daughter and her children three village lots, and had given a legacy of \$1,500 to a family of grand-children ; and he had devised to his wife, who is the present plaintiff, for her life, a number of village lots, besides two larger tracts of  $10\frac{3}{4}$  and  $11\frac{1}{2}$  acres respectively giving her also his household furniture and other specified, effects ; and devising one of the village lots in remainder to his daughter Mary.

By a subsequent clause he charges his personal estate with an annuity of \$1,000 for his wife, and gives power to his executors, if they think fit so to do, to “ keep up and maintain, repair, build, and rebuild on such of my real estates as they may deem to the advantage of my said four children last named, and for such purpose they shall use only the rents and profits of my real estate.”

There is a direction respecting the surplus money which the executors may have in their hands, in these words :

“ I also will and direct my said executrix and executors to invest at interest on mortgages, or other good security, all surplus moneys in their hands from time to time during the infancy of my said last mentioned four children, and upon the youngest of them, or the survivor or survivors of them, attaining the full age of twenty-one years, to divide the same personal estate, share and share alike, between them, or the survivors of them. And I further will and direct my said executrix and executors, if it shall seem prudent for them so to do, upon any of my said four last mentioned children attaining the full age of twenty-one years, shall advance such sum or sums of money out of the share or shares of such child as may be desirable for establishing such child in some business or professional pursuit.”

And, following all these provisions, there is this residuary bequest of the personal estate :

“I do hereby further will and devise all my personal estate of every kind whatsoever, not heretofore mentioned, devised by this my will to my executrix and executors, or such of them as shall prove this my will in trust for my said last mentioned four children, share and share alike, to be divided at the same time the division of the said real estate takes place, as hereinbefore mentioned; and I will and direct that my said personal estate and effects, debts and mortgages, shall be collected and got in by the best means that my executrix and executors may be able to adopt, when so collected, shall be invested and kept invested in a good safe security at such rates of interest as my said executrix and executors may approve.”

The structure of this clause is the same as the residuary devise of the real estate, the property being given directly in trust for the children, and to be divided when the partition of the real estate is made, differing only in the absence of any gift over in the event of the death of a beneficiary before the period of distribution, and it thus imports the vesting of that part of the estate without the liability to be divested which is attached to the real estate.

The clause respecting the surplus moneys follows immediately after the maintenance clause, and the surplus moneys intended must be such part of the income as may happen not to be required for maintenance. That is to be invested, or it may be applied to the advancement of the children. It might seem from the juxtaposition of the clauses that the share or shares out of which the advancement is permitted, are only the shares of these surplus moneys. There is, however, no such limitation to be found in the terms of the clause, nor any reason why it should not be understood to extend to all the personal estate.

What is very clear is, that, one way or another, the whole income from the residuary estate, real and personal, except so far as the charge of the widow's annuity on the personal estate interferes, is given to the children. The surplus is not spoken of as any certain proportion, but in terms which imply full power in the executors to use as much of the income as they think proper in the maintenance of the children. The power to apply the shares by



way of advancement, and the power to spend income derived from the real estate in repairs and improvements for the advantage of the four children, agree with the other provisions in shewing that the whole income belongs to the children.

“In all cases,” said Sir W. P. Wood, V. C., in *Pearson v. Dolman*, L. R. 3 Eq. 315, 321, “I apprehend, when ultimately, as in *Saunders v. Vautier*, Cr. & P. 240, the accumulated residue, whatever it may be, is to go to the same legatee, then the whole gift is vested.”

In my reading of this will, the residuary devise and bequest, even if worded in a manner less expressive of immediate vesting than the terms actually used, would by virtue of the disposition made of the income be properly held to confer vested interests. But we have here immediate gifts with words purporting only a postponement of the possession, and the disposition of the income in no way controverts, but goes strongly to confirm, the conclusion that vested interests passed by the will.

The direction as to the ultimate distribution of the surplus moneys differs slightly, as it is worded, from the direction as to the corpus of the estate. It is upon the youngest of the four, or the survivor or survivors of them attaining twenty-one, “to divide the same personal estate, share and share alike, between them, or the survivor or survivors of them.” It is scarcely worth while to dwell on this, because we are told there is nothing on which the surplus clause can operate. But it cannot be understood to require that the surplus moneys, which, by the bye, are here not called moneys as they were earlier in the clause, but personal estate, shall be dealt with differently from the corpus of the personal estate, which in the residuary clause is directed to be divided among the four children, nothing being said of survivors, thereby avoiding any suggestion of contingency in the bequest. There was a discrepancy of the same nature in the will in *Re Duke*, 16 Ch. D. 112, and we may say here, as Lord Justice Cotton said there :

“The clause amounts only to a direction that the fund is not to be disturbed till the period of distribution, with an erroneous reference to the way in which it is then to be disposed of.”

The effect of the direct trust for the children, on which I have laid so much stress, is not inaptly described in another passage in the judgment of Lord Hatherley, in *Pearson v. Dolman*:

“In this case,” he said, “the property is given to the two trustees, a circumstance always held to be favourable to vesting, and relied upon by Lord Cottenham, in *Saunders v. Vautier*, following, as he did, *Love v. L'Estrange*, 5 Bro. P. C. 59, as shewing a separation of the legacy from the bulk of the testator's estate.”

For these reasons I think the proper answer to the first question is, that the four children take vested interests in the residuary real and personal estates, the interest in the real estate being liable to be divested by death, leaving issue, before the time for partition, which is when the youngest of the four children who survives to attain the age of twenty-one shall attain that age.

The other question is, whether Peter James Cooley, who has attained his majority, is entitled to maintenance out of the estate.

The learned Judge has answered this question in the negative, and I agree both with his answer and with the reasons he gives for it.

The maintenance clause is plain and unambiguous, and any suggestions of hardship are answered by the existence of the power, which, as I have said, I do not take to be confined to the surplus income, to advance such part of the share as may be desirable for establishing him in some business or professional pursuit.

We should, therefore, vary the judgment so far as it relates to the nature of the interest taken by the devisees, and to that extent should allow the appeal.

The costs of all parties should come out of the estate.

OSLER, J.A.—I agree with my brother Patterson in thinking that the four named children of the testator take vested interests under the first clause of the will, subject as to any one of them, to be divested on the contingency of death under twenty-one, without issue, and in favor of the issue in the event of death under that age leaving issue. The legal estate is devised to trustees to hold immediately in trust for these four children, the period of distribution being postponed until they or the youngest survivor arrive at the age of twenty-one. In favour of vesting, the condition of surviving until that period must be read as a condition subsequent, the failure of which divests the equitable estate already vested by the earlier part of the clause. The advancement clause by which the trustees are authorized upon any of the children attaining the age of twenty-one, to advance moneys out of the share of such child, strongly supports this construction, although I do not think it necessary to rely upon it.

On the other point I agree with the learned Judge in the Court below, that the provision for maintenance is for the benefit of the minor children only as indicated by the terms of that clause, and the advancement clause already referred to.

I refer to *Hayes* and *Jarman* on Wills, p. 206, and the cases there cited: *Rigley v. Gurnett*, 2 DeG. & Sm. 629; *In re Duke*, 16 Ch. D. 114, per James, L.J.; *Hawkins* on Wills, 337, 238, 241.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

*Judgment accordingly.*

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## ST. DENIS V. BAXTER.

*Insufficient findings of jury—New trial—Costs.*

The judgment of the Chancery Division, reported 13 O. R. 41, directing judgment to be entered for the defendant, was reversed, and judgment directed to be entered for the plaintiff on the findings of the jury, for \$100, with County Court costs, unless the defendants elected within a time to be named to take a new trial.

HAGARTY, C. J. O., dissenting.

*Per* HAGARTY, C. J. O.—There had been a miscarriage at the trial. Neither party was entitled to judgment on the findings of the jury, and there should be a new trial.

February 8th, 1885.

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## BATE v. CANADIAN PACIFIC RAILWAY.

*Railway—Negligence—Return ticket at reduced rate—Condition limiting liability.*

The plaintiff, with her father and brother, went some hours before the departure of the train on which she was a passenger, to a ticket office of the defendants in O., in order to procure a ticket to W. and return. The only kind of return ticket issued, on the route, by the defendants, was called a land-seeker's ticket, for which thirty dollars less than the fare each way separately was charged. These tickets were not transferable, and were subject to a number of conditions printed on them, among which was one limiting the baggage liability to wearing apparel not exceeding one hundred dollars in value; and another condition required the signature of the passenger to the ticket for the purpose of identification and to prevent its transfer. The plaintiff's brother purchased the ticket for her, and at his request the time for using it was extended beyond the time limited by the ticket. The defendants' agent then asked for and obtained plaintiff's signature to the ticket, by which she agreed, in consideration of the reduced rate, to all its provisions, explaining to her that it was for the purpose of identification. The plaintiff did not read the ticket, having sore eyes at the time, and the agent did not read or explain the conditions to her further than by mentioning that she alone could use it.

On the trip to W., an accident happened to the road-bed of the defendants' railway by reason of which the train was over-turned, and the plaintiff's baggage, valued at over one thousand dollars, caught fire, and was destroyed. The railway had been constructed by the government and transferred to defendants. There were no indications before the accident of any defect in the road-bed.

In an action for damages for such loss the jury found a verdict for the full amount of the alleged value, which on application to the Divisional Court was set aside, [ROSE, J., dissenting,] and the action dismissed with costs. On appeal to this Court it was

*Held*, [by the majority of the Court,] affirming the judgment of the Court below, that there was no evidence of any negligence with which the defendants were chargeable.

*Held*, also, [BURTON, J.A., dissenting,] that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage.

*Per* BURTON, J.A.—The delivery of the ticket with any condition, by itself amounted only to a proposal to carry on certain terms, and until brought to the notice of the party intended to be bound was not a contract.

THIS was an appeal from the judgment of the Common Pleas Division reported 14 O. R. 625, and came on for hearing on the 19th of April 1888\*

*McCarthy*, Q.C., for the appellant.

*Robinson*, Q.C., and *G. H. Watson*, for respondents.

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

The facts and the authorities cited are fully stated in the Court below, and in the present judgments.

June 29, 1888. PATTERSON, J. A.—I think the judgment of the Divisional Court is right.

I do not know that I am led to that conclusion by precisely the same train of reasoning that influenced the learned Judges who concurred in the decision, and I shall therefore make an independent statement of my views.

The main question is, the extent of obligation involved in the contract of the defendants.

The plaintiff's luggage, for the loss of which she brings the action, was delivered by her to the defendants, as passenger's luggage, to be carried with her on the journey from Ottawa to Winnipeg, and was regularly received, checked, and placed in the baggage car. Under the general rule, the company would be liable, as common carriers, for the full value of the luggage, whether the fire which consumed the car and its contents was attributable to their negligence, or to some cause for which they were not open to blame.

For authority for this proposition it is only necessary to cite the comparatively late cases of *Talley v. Great North Western Railway Company*, L. R. 6 C. P. 44; *Cohen v. South Eastern Railway Company*, 2 Exch. D 253, and *Bergheim v. Great Eastern Railway Company*, 3 C. P. D. 221. The reasoning of the last mentioned case respecting the liability for luggage which the passenger takes with him into the carriage has been recently spoken of with some disapproval in *Great Western Railway Company v. Bunch*, 13 App. Cas. 31, but no fault is found with the dicta affirming the unqualified liability as common carriers for luggage taken full charge of by the company. The case of *Great Western Railway Company v. Bunch* may be added to the list of authorities for that unqualified liability, which seems now firmly settled, although opinions to the contrary were held to as late a date as 1864. See *Stewart v. London and North Western Railway Company Co.*, 3 H & C. 135.

But the defendants contend that while they undertook to carry the plaintiff's luggage, they did so only upon the

terms that their liability was limited to wearing apparel not exceeding \$100 in value.

I do not propose to discuss the statutory provisions which were in question in *Vogel v. Grand Trunk Railway Company*, 10 A. R. 162, 11 S. C. R. 112, and which are now found in R. S. C. ch. 109, sect. 104. I have not formed any opinion adverse to the application of the section to the case of a passenger travelling on a return ticket who loses his baggage or suffers personal injury by reason of the road-bed of the railway being allowed, by the negligence of the company, to be in an unsafe condition.

I think they are inapplicable here, because there was in my opinion no evidence of any negligence with which the defendant company was chargeable.

The jury have not found the defendants guilty of negligence in regard to the road-way. They find that the accident was caused by the improper construction of the road-bed ; but it was not constructed by the defendants. It is part of the road which, by the sixth clause of the agreement between the Government and the defendant company, set out in the schedule to the statute 44 Vict. ch 1 (D), was to be completed by the Government of equally good quality in every respect with the standard prescribed by the agreement for the portion contracted for by the company, and which, when completed, was to be conveyed to the company ; after which, by the seventh clause, the company was for ever efficiently to maintain, work and run the Canadian Pacific Railway.

Under this agreement and statute it undoubtedly became the duty of the defendants efficiently to maintain the part of the railway the subsidence or sliding of which caused the accident ; but does the fact found by the jury, that the accident was caused by the improper construction of the road-bed, involve a charge of negligence against the defendants for using the road in the state in which it was conveyed to them as a completed road by the government ?

There is evidence that this part of the road had been run for one season by the contractors before it was taken off

their hands by the Government in or about May, 1883, and it was run continuously up to the occurrence of the accident on the third of October, 1886, a train passing over it in safety a few minutes before the accident, nothing occurring in all that time to create suspicion of the bank being insecure, and no repairs but ordinary track repairs being required. If the defendants were negligent in using the road in the state in which they received it, when did their negligence begin? If the accident had happened the day after they received the road, on what ground could it be said to have been caused by their negligence?

I see none, nor do I see on what evidence it could be properly held that they had any duty with respect to the road which they failed to discharge. The attack and defence on this branch of the case seems to have been confined at the trial to the original construction of the road. The jury were not asked to say in what particular they found the defendants to have failed in their duty, and it would be difficult to point to evidence on which a charge of such failure could have been reasonably supported. The chief witness for the plaintiff was Mr. Shaw, a Civil Engineer, who happened to be a passenger on the ill-fated train; he described the embankment as being constructed of sharp sand on a slanting rock, and attributed the shifting of the structure to that mode of construction. His opportunities of observing what he described would seem from reading the evidence scarcely to have warranted the confidence with which he gave his account, which materially differed from that of an engineer and one or two other persons who had been engaged in the work of construction, and who proved, if their evidence is true, that Shaw was very far astray both as to the material used and the bottom on which it rested. Mr. Shaw's theory may be gathered from the following extract from the report of his evidence.

*“Mr. O’Gara—Q.* Was that the proper way to make an embankment over a ledge of rock of that kind? *A.* Not to my judgment as an engineer.

*Q.* You have been employed, I believe, in the construction of railways? *A.* Yes a good many years.



Q. What should be done in order to make that a safe and proper embankment; A. There should have been a retaining wall, in a case like that, at the foot, to keep it from sliding into the muskeg, and it should have been of different material.

Q. What is the character of that coarse sand? A. Well, it has no cohesion, it is not fit for railway work.

Q. Does not stick together and form a compact body? A. No.

Q. And is liable to come away at any time? A. Yes, the shock of a passing train would cause it to fall: keeps slipping. I fancy the cause of this accident was from water getting at the toe of the embankment which it melts, the sand and water from the muskeg might have turned into a kind of quicksand.

Q. Eats it away? A. Yes; eats it away."

Now whatever may have been the value of Mr. Shaw's evidence, or of his opinion as an expert, he does not speak of anything which should have called the attention of the defendants to what he considers the defective construction of the road, or to the sapping process to which he attributes the giving way of the bank; while on the other side there is direct evidence that there were no indications of the kind.

There are two cases which may be noted as useful authorities in dealing with this branch of the case. *Redhead v. Midland Railway Company*, L. R. 2 Q. B. 412, and in the Exchequer Chamber 4 Q. B. 379, which finally decided that in carrying passengers the company are not insurers like common carriers of goods, but are bound only to use due care and diligence, and *Richardson v. Great Eastern Railway Company*, 1 C. P. D. 342, where the judgment reported in L. R. 10 C. P. 486, was reversed.

Those cases related to defects in vehicles used by the carriers, but they were decided on principles equally applicable to defects in the permanent works of a railway.

A good deal of the reasoning of Sir Montague Smith, who delivered the judgment of the Exchequer Chamber in *Redhead's Case*, is founded on cases relating to structures, such as *Brazier v. Polytechnic Institution*, 1 F. & F. 507;

*Pike v. Polytechnic Institution*, 1 F. & F. 712; *Ford v. London and South Western Railway Company*, 2 F. & F. 730, 732; and *Grote v. Chester and Holyhead Railway Company*, 2 Exch. 251.

In *Richardson's Case* a collision had been caused by the breaking of the axle of a coal truck which did not belong to the defendant company, but had come on to their road from another line. The axle broke in consequence of a crack which might have been discovered by scraping off the dirt and minutely examining the axle. The jury found that it was not the duty of the company to have made a minute examination of that kind, but said it was their duty to have required from the owner of the truck some distinct assurance that it had been thoroughly examined and repaired. A defect which had no connection with that in the axle had been observed and repaired. Referring to it and to the jury's answer about the assurance that ought to have been obtained, Jessel, M. R. said, p. 345 :

"If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now I read the answer of the jury to the third question as meaning that there was no such duty as suggested by the question, but that the defendant ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed or that it had been neglected. It is not for the jury to lay down an absolute duty such as this, irrespective of the case and the evidence laid before them. It is impossible to make that answer a foundation for a verdict against the defendants."

The judgments of Mellish L. J., and of Pollock B., put the same view with much force.

In the case before us there was no defect discovered, but from the time when the defendants received the road from the government and became bound by the agreement which

the statute affirmed to maintain and work it, and for some time before that, it had appeared to be safe and sound.

Two other questions which were answered by the jury were these :—

“ Q. Could the baggage have been saved by proper efforts of the company's officers and servants, if they had proper appliances ? Yes.

Q. Was the train supplied with proper appliances for saving baggage in such an emergency or not ? No.”

These answers may be conceded to be absolutely true without touching the issue of negligence.

When we think of what the emergency was as described by the witnesses : the baggage car turned on end and in flames ; the baggage man hemmed in by trunks ; many others in danger and unable to extricate themselves ; one at least of the train hands receiving injuries which proved fatal ; the night dark, except as illuminated by the burning cars ; and the efforts of every one directed to the saving of life ; we cannot take the finding that with proper appliances for saving baggage in such an emergency the baggage could be saved to be more than a vague truism, not involving the assertion of any duty incumbent upon the company or possible of performance. The concluding remarks of Sir George Jessel which I have just been quoting are apposite to these answers.

The company being therefore at liberty to limit the liability attaching at common law to common carriers, let us see if that was done.

The findings of the jury respecting the contract are confined to a few particulars, and are contained in the answers to three questions.

“ Q. Did the plaintiff sign the printed form produced to her by the ticket agent at Ottawa when she asked for a return ticket to Winnipeg and back ? A. Yes.

Q. Upon what representation and for what purpose did she sign that printed form ? A. For the purpose of identification.

Q. Did she read it before signing or was it read to her, or was her attention called to its special provisions, further

than that the ticket was, not transferable, and therefore required her signature for the purpose of identification? A. No.?

These questions are intelligible only in connection with other facts which it was not thought necessary by the counsel by whom the questions seem to have been settled, or by the Judge, to have formally found. Some of those other facts are proved by the witnesses, and with respect to others we may say, as Lord Halsbury said of similar facts in *Great Western R. W. Co. v. Bunch*, *supra*, that both sides assumed them to be proved, and it would be mere pedantry to suggest that they were not formally proved.

There is no conflict of testimony among the witnesses who speak of the transaction out of which the contract arose. They are the plaintiff, her father, her brother, and Mr. Parker the company's ticket agent at Ottawa. The plaintiff desired to go from Ottawa to Winnipeg and after spending some time at Winnipeg to return to Ottawa. The ordinary fare from Ottawa to Winnipeg was \$40, and from Winnipeg to Ottawa \$45 or \$46, the trip thus costing \$85 or \$86 when the fare each way was paid separately. But the company was accustomed to issue return tickets, called land seekers' tickets, at a considerable reduction on the ordinary rates. This was the only kind of return ticket issued, on this route, by the company. It was in the following words:—

“Issued by Canadian Pacific Railway. Good for one first-class passage to ——— station, stamped or written in margin of attached coupon and return, only on presentation of this ticket when stamped by company's agent and presented with coupons attached subject to the following contract:—

1st. It is not good for passage if any alterations or erasures whatever are made thereon.

2nd. If the coupons are marked second-class or emigrant, the passenger is entitled to such passage only.

3rd. If this contract and its coupons bear no “L” punch cancellations or stamp other than the ordinary dating stamp, the passenger is entitled to all the privileges accorded to holders of unlimited tickets of like class.



4th. If this contract and its coupons are cancelled with an "L" punch, it indicates that the ticket was sold at a reduced rate, and must be used on or before the expiration of date as cancelled on the margin thereof, and that no stop over will be allowed hereon. If not so used, or if more than one date is cancelled, it is void.

5th. This ticket is not transferable; it must be signed by the passenger in ink, and if presented by any other than the original purchaser whose signature is hereon, the conductor will take it up and collect full fare, the purchaser will write his or her signature when requested to do so by the conductors or agents.

6th. The return part of the ticket will not be honoured for passage, unless the holder identifies himself or herself, as the original purchaser to the satisfaction of the ticket agent of the Canadian Pacific Railway at station stamped or written in margin of the ticket, and unless officially signed and dated in ink and duly stamped on back hereof by authorized agent.

7th. Baggage liability limited to wearing apparel not exceeding \$100 in value.

8th. The coupons belonging to this ticket will not be received for passage if detached.

W. C. VAN HORN,  
Vice-President.

In consideration of the reduced rate at which this ticket is sold, I hereby agree to all the provisions of the above contract.

KATIE BATE, (signature.)  
J. E. PARKER, (witness.)

Issued by Canadian Pacific Railway."

It was printed on a long strip of paper about three inches wide, with four coupons following it, besides having another coupon at the top called "Agent's Stub" and marked "Not good for passage," the whole paper being more than a foot in length.

The price charged for one of these tickets for passage from Ottawa to Winnipeg, and return within forty days, was \$55, a reduction of \$30 from the ordinary full fare.

The plaintiff's father inquired about the terms as to rates charged and time allowed, but took no part in the actual purchase of the ticket. That was done by the plain-

tiff herself and her brother, or rather by the brother for the plaintiff, at Mr. Parker's office, about ten<sup>o</sup> in the forenoon of the 20th of September, 1886, the train leaving about mid-night.

The office is not at the station, but is an office in another part of the city.

The plaintiff wished to remain longer than forty days, and her brother asked Mr. Parker if he could extend the time to about Christmas. After some conversation, Mr. Parker agreed to do so, and altered the ticket accordingly. When he had completed the filling out of the ticket, all which was done in the presence of the plaintiff and her brother, he placed the ticket on the counter for her to sign; she asked why she was required to sign it, and Mr. Parker explained to her that the ticket was not transferable, and that her signature was required for the purpose of identification. She thereupon signed the document, her brother standing beside her speaking to some one, and she took the ticket home with her. I believe we are not told who folded up the paper, but the plaintiff says that she could not read it because her eyes were sore.

These are the undisputed facts in evidence. The findings of the jury are inferences proper to be drawn from the evidence, and we have to say if, upon those facts and findings, the liability of the company can properly be held to extend beyond the amount of \$100 mentioned in the seventh condition.

Primâ facie the plaintiff is bound by her signature to the contract, and the effort on her part is of course to get rid of the primâ facie effect of her act.

We are expected to take as proved a very important fact which is not embraced in the findings of the jury, namely, that neither the plaintiff, her father nor her brother knew what the conditions were, or that there were any conditions on the paper she signed.

I cannot make that assumption as a result of the evidence, if I am to reason about it at all. I think the younger Mr. Bate rebuts it. It might be unjust to him, and it certainly

would be uncomplimentary, to suppose that he was so unintelligent, or that he took so little interest in the business he was doing for his sister or father, paying the sister's fare with the father's money, as not to have been aware that the document he saw was not an ordinary ticket. But he knew of at least one special term, viz., that concerning the time, which he procured Mr. Parker to alter, and he heard Mr. Parker speak of another which made the ticket not transferable.

But in the view I take of the legal position no importance attaches to the plaintiff's signature. It was only necessary for the purpose of identification, and Mr. Parker was quite right when he told the plaintiff that that was what it was for. He, in fact, merely told her what is set out in the fifth condition. When he explained that the ticket was not transferable, he did two things: he gave the reason for requiring the means of identifying the holder of the ticket, and he referred to a restriction which would be understood, as we may suppose, by the plaintiff, or at all events by her brother, to be something stated in the document. There is no support in the evidence or in the findings of the jury for the suggestion that he concealed the fact that there were other conditions, or in any way led her to forbear examining them for herself. The most that can be said has been said by the jury; that is, that the plaintiff did not read the paper before signing it, and that Mr. Parker did not read it to her or call her attention to the special conditions, further than by mentioning the fact that she alone could use the ticket as the reason why her signature was required. If he had not asked her to sign, but had simply handed her the ticket, there is no reason to suppose that she would have read it or got any one to read it for her; yet, whether she did or did not inform herself of the contents of the paper, it must be taken in my judgment to embody the terms on which alone the company contracted with her. There was no contract outside of these terms. The company never offered to carry her and her luggage at the reduced rate except on these terms.

It will not be necessary to refer to many decisions in support of this position.

*Stewart v. London and North Western Railway Company*, 3 H. & C. 135, was very like this case. A condition in the time bills which were referred to by the tickets issued for an excursion train, was "Luggage under 60 lbs. free at passengers' own risk." The plaintiff's luggage was lost by the negligence of the company, and the company was held to be protected by the condition. One point decided was that the condition was not governed by the Railway and Canal Traffic Act, 17 & 18 Vict, ch. 31, sect. 7. The correctness of that holding has been questioned, and perhaps over-ruled, in *Cohen v. South Eastern Railway Company*, but apart from that difference of opinion, which does not touch the circumstances of our case, the principles on which the contract was dealt with may be taken as applicable to it. Pollock, C.B., said, "As to the finding of the jury, that the plaintiff was not aware of the contents of the time bills, the rule applies that a person must be presumed to know what he has the means of knowing, whether he avails himself of those means or not. The bills shew the terms on which the railway company run these special trains," &c., and Bramwell, B.: "First," he says, "I did not know what was on the ticket," thus claiming the benefit of his own carelessness in not reading it. It is enough that he has had the opportunity," &c. Pigott, B., remarked: "This was a special contract, and it was competent for the parties to make it."

A number of cases from 1862 onwards, not however including *Stewart v. London and North Western R. W. Co.*, are examined by Stephen, J., in *Watkins v. Rymill*, 10 Q. B. D. 178.

"Thrown into a general form," he says at p. 188, "the result of the authorities considered appears to be as follows:—A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract; such a form constitutes the offer of the party who tenders it. If the form



is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule, however, there are a variety of exceptions. (1) In the first place the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special terms."

I need not quote further, but merely refer to the report. From what I have already said, it will appear that the present case cannot, in my judgment, be brought within any of the exceptions. I think it comes within the general rule, and that the application of that rule to it is illustrated by the latest of the cases reviewed by Mr. Justice Stephen, viz: *Burke v. South Eastern R. W. Co.*, 5 C. P. D. 1, decided in 1879. I shall read what he says of it.

"In this case the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was, 'Cheap return ticket, London to Paris and back, second class,' and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants and said he had not read the condition and did not know it. Cockburn, C.J., asked the jury the question suggested in *Parker v. South Eastern Railway Company*, [that is, whether the company did what was reasonably sufficient to give the plaintiff notice of the condition], and they answered in favor of the plaintiff. The defendants moved to have judgment entered for them and this was done, the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this case can hardly be supported by any principle short of that laid down in *Zunz v. South Eastern Railway Company*, if indeed it does not go further."

This reference is to the language of Cockburn, C. J., in *L. R.*, 4 Q. B. at p. 644, where he laid down the law as follows:—

“However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print on his ticket, which he only gets at the last moment, after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get the ticket by the next comer, still we are bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it, and to be bound by them.”

There is no such reason to call the rule, when applied in this case, a harsh rule. The plaintiff had by herself and her friends the most ample opportunities to inform herself of the conditions connected with the reduction of fares on these land-seekers' tickets. The condition touching the \$100 worth of wearing apparel would be sufficiently liberal for the class indicated by the designation of the ticket, even if it limited the quantity of luggage to be carried to \$100 worth. That is not the limitation, which extends only to the liability of the company in case of loss, and it is open to every one, as it was to the plaintiff, to render the company liable without that limitation by paying full fare instead of accepting the return ticket at a greatly reduced rate.

In my opinion, we should dismiss the appeal with costs.

HAGARTY, C. J., O.—I agree fully with the judgment just delivered.

I only add a few words to emphasize the clear distinction which is in my mind between the case of a passenger applying for carriage by a railway company at ordinary rates common to the travelling public, and of one desiring to travel on reduced rates and terms, and obtaining certain advantages not obtainable except by special agreement.

The Courts properly regard with jealous scrutiny any attempt to grant exemptions from liability on ordinary travellers at rates common to all. The common carrier has to accept the traveller at the common rate, and he must give reasonably clear evidence of the agreement by the passenger to any special contract for exemption. This

is very clearly put in the leading case in the Lords in *Henderson v. Stevenson*, L. R. 2 Sc. Ap. 470.

But the plaintiff here stands in a distinct position; a special bargain is made as to journey and return, and as to the time to be allowed therefor and the reduced rate of carriage. That bargain is evidenced by the document handed to the plaintiff, and whether signed by her or not is in my judgment the contract of carriage. It is read or not read as the bearer may think fit.

I am wholly unable to accede to the appellant's argument that the plaintiff could in any way be misled or thrown off her guard by the clerk asking for her signature and telling her it was for the purpose of identification. This was perfectly true, and how this is to be interpreted to mean that the conditions of the contract have no other bearing or meaning, I am unable to understand.

I think the plaintiff is not entitled to recover beyond the amount already paid,

OSLER, J. A., concurred.

BURTON, J. A.—There is no dispute as to the amount of the loss in this case, which the jury has assessed at \$1,077.50, less \$100 paid into Court, and which the defendants contend is sufficient under the terms of the special contract which they set up to cover the loss, even if there is any legal liability, which they dispute. The Divisional Court set aside that verdict and entered judgment for the defendants, the Court being divided in opinion. Mr. Justice Rose, on the ground that there was evidence of negligence, and that the findings of the jury on that point could not be interfered with. The Chief Justice and Mr. Justice Galt, that the negligence was not that kind of negligence which was contemplated by the sections of the Railway Act relied upon in the *Vogel Case*, and holding that the plaintiffs had no right of action beyond the claim of \$100, which if the contract was established might in the absence of negligence perhaps well be, but apparently over-looking the fact that

the evidence and the findings of the jury negatived any such contract; or holding perhaps, that by travelling on the ticket the contract was conclusively established.

I do not propose to discuss the question of negligence which has been so fully gone into by some of the Judges below, and by one of my learned brothers in this Court, because in my view of the case it is not material. The defendants are liable to the full amount found by the jury as common carriers, unless they have proved that they were exempt wholly or partially by some agreement made and entered into between the plaintiff and themselves. That the defendants never offered to carry the plaintiff and her luggage upon any other terms is, with great respect, quite beside the question. The delivery of the ticket with any condition by itself amounts only to a proposal to carry upon certain terms, and until brought to the notice of the party intended to be bound is not a contract; whereas in the present case the defendants held themselves out as carriers of passengers. As remarked somewhere, a *vinculum juris* with one end loose is on principle an inadmissible conception.

To constitute a contract there must be an agreement, which may be ascertained "either by the concurrence of the parties in a spoken or written form of words as expressing their common intention," or by a proposal being made by one of them and accepted by the other. In a case recently before us there was not only evidence of the terms on which the company proposed to carry, but that the plaintiff knew that he was being carried at a reduced rate in consideration of his submitting to certain conditions or restrictions. That of course constituted the contract; if the plaintiff having notice that there were some conditions omitted to inform himself of their precise character, that would not affect the actual contract. Conduct may of course be relied on as constituting the acceptance of a contract, but is in every case a question of fact for a jury, not as it appears to have been treated in some of the earlier cases, a matter of law, and it (no less than the words



relied on for the same purpose) must be unambiguous and unconditional.

I think the late cases seem to establish this proposition, that actual knowledge may be inferred as a fact from reasonable means of knowledge, but it is a question for the jury under all the circumstances of the particular case. If, in the present case, it had been shewn that it was distinctly pointed out to the plaintiff that the company had two rates of fare, under one of which they assumed the ordinary risks of carriers of passengers and their luggage, and under the other or reduced rate they claimed by special contract to relieve themselves of part of their common law liability, I can see no reason why such a contract would not be perfectly legal and binding. But it appears to me that the onus was upon the company to establish not only that there was a difference in the fare charged on ordinary and return tickets, but that a person accepting a return ticket assumed certain risks and relieved the company to that extent.

It is a matter of common knowledge, and one of which Courts of law must, (unless indeed the rights of litigants are to be adjudicated upon on mere theories and not on what we all know to be the ordinary usages of life in matters of the kind) take notice that railway companies do, for the purpose of securing traffic for their lines, issue return tickets at reduced rates without exacting or imposing any condition or restriction of their liability by reason of such reductions, although they do sometimes in such cases require the signature of the party to prevent the ticket being transferred. There were certain facts in this case which were undisputed, and certain other facts which it was quite unnecessary to leave to the jury. For instance, that the plaintiff did not in point of fact know of the condition or have her attention drawn to it by the company or its officials, and the further fact that the plaintiff signed the printed form, though found specially by the jury, were facts upon which the evidence was uncontradicted. But the other questions were important. Upon what repre-

sentation and for what purpose did she sign the printed form? The answer is strictly in conformity with the evidence. For the purpose of identification. She is then asked; Did she read it before signing, or was it read to her, or was her attention called to its special provisions further than that the ticket was not transferable, and therefore required her signature for the purpose of identification, and the answer is in the negative. Apart from the answers of the jury, it is quite clear from the evidence that the only information given to the plaintiff, her father or her brother, was that the ticket was only good for forty days, and the agent consented to extend that period. In other respects it was the usual form of such tickets with coupons, which the parties would have no means of reading till issued and paid for.

Granting that the denial of the plaintiff is not necessarily conclusive, what is there in the circumstances of this case to cast a doubt upon her evidence or to lead necessarily to the inference that she either knew or ought to have known that the ticket contained conditions? A much stronger case would have been made against the plaintiff, if the only facts had been that she had applied for a ticket without anything being said beyond the fact that return tickets were issued at a reduced rate; it might have been urged with much greater force that the notice on the face of the ticket was sufficient information to her, but even then it would have been a question for the jury, and we could not have interfered with their finding and hold as a matter of law that the verdict should be entered the other way, or even send the case down again for trial. But the circumstances of this case are much stronger in favour of the plaintiff. In the first place there is the express denial of the plaintiff; there is the fact that although asked to sign the ticket, she was told that it was for the purpose of identification, and that she would have to do so also at Winnipeg, so as to prevent a transfer of the ticket to any one else, which though true in fact was only half the truth, as it purported to be an actual

agreement on her part to agree to all the provisions of the above contract; a circumstance strongly calculated to put her off her guard, even if there had been no obstacle to her informing herself by reading the ticket; but there is the additional fact that she had a weakness of the eyes which prevented her reading it.

As to the suggested difficulty about calling attention specially to the terms, it would have been no more trouble for the station agent to inform the plaintiff that the signature was required for a two-fold object, to prevent the ticket being transferred, and to bind her to the conditions, than to make the one statement only, which, though true, was misleading. No doubt, as has been pointed out in a number of the cases to which we were referred, where the contract is made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract, that constitutes an offer; if it is accepted without objection by the other he is as a general rule bound by its contents, and his act amounts to an acceptance whether he reads the document or not, and a fortiori where he signs it; but these are subject to exceptions.

One of these is, that the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that it contains no terms at all, but is a mere acknowledgement of the money paid and a voucher to satisfy other parties, as the railway officials in the present case, that the holder is entitled to travel upon it for the period mentioned in it.

As put by Lord Justice Mellish, in *Parker v. The South Eastern R. W. Co.*, if a person driving through a turnpike gate receives a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike gate and might put it in his pocket unread; and then he distinguishes such a case from that of a person shipping goods on a sea voyage and receiving a bill

of lading, who would be bound by the terms of it, though he never read it, the reason being that in the great majority of cases persons shipping goods do know that the bill of lading does contain the terms of the contract of carriage.

There is also an obvious distinction between those cases where there is a common law liability, as in cases where persons become bailees for reward of articles deposited with them for safe custody, as in the cloak room cases, and such cases as *Watkins v. Rymill*. In the former, in the absence of any special contract the party receiving the property is responsible to the depositors for the full value if unable to restore it on demand. The question in such cases is whether the ordinary contracts of bailment, which would have resulted from the receipt by the company or person of the property and the payment by the plaintiff of the prescribed charges, have been modified by agreement.

In such cases the depositor is entitled *primâ facie* to regard the ticket as a mere receipt and a voucher to enable him to reclaim his property, and is in no way put upon inquiry whether the depositee has any further or ulterior object. If the depositor was aware that there were conditions *cadit quæstio*. I think he would also be equally bound if he was aware or had good reason to believe that there were statements upon the ticket intended to affect the relative rights of himself and the other party, and did not take the pains to read them and ascertain precisely what they were. But the onus of bringing this knowledge home would be upon the defendant (*Gabell v. South Eastern Railway Company*, 36 L. T. N. S. 154.) In the absence of any such knowledge or information or good reason for belief, there would be no obligation to examine the ticket with the view of ascertaining whether there were any conditions upon it. Whether he had such knowledge, information or reason for belief is a question of fact to be determined by the jury on the evidence.

On the other hand, as in such cases as *Watkins v. Rymill*, there is no common law liability; and none being ascertained by the common law, the terms must necessarily



depend on the agreement of the parties. That was the case of the deposit of an article for sale on commission. From the very nature of the case, the special terms must be gleaned from the receipt and conditions contained in it, and this, therefore, constituted the contract between the parties, and any question as to whether the plaintiff read the conditions or not would be beside the question.

Whatever difference of opinion may have existed, the result of the authorities appears to be that except in such cases as I have just referred to, where the finding of the jury would be regarded as perverse if they found against the knowledge of the party accepting the document, it must always be a question of fact for the jury, whether the company had taken reasonable means to make known the conditions; and whatever value may be attached to any remarks of such a distinguished man as Chief Justice Cockburn, I must call attention to the fact that the language used by him, and which has been cited from his judgment in *Zunz v. The South Eastern R. W. Co.*, was a mere obiter dictum, not essential in any way to the decision; there was no contention in that case that the plaintiff did not know of the condition, the sole question was whether it came within the Railway and Canal Traffic Act, in which case it was required to be in writing. But whether that was or not the opinion of the learned Judge at that time, it is quite clear that it was not so ten years later, when in summing up to the jury in the case of *Burke v. South Eastern R. W. Co.*, (41 L. T. N. S. 554) he said :

“The defendants have a perfect right to make that condition with the passenger, and to stipulate that they shall not be responsible for the negligence of the other company, but they must take care that they bring that condition home to the knowledge of the passenger, or at all events that they do what in the opinion of the jury is reasonably sufficient to give him that knowledge.”

That would have been a perfectly good charge in a case like the present, but was totally inapplicable to that which

the learned Judge was trying. The loss occurred upon a French railway, and the plaintiff could not recover without producing the ticket; when produced it disclosed the condition relieving the defendants from responsibility, and it was the duty of the learned Judge to nonsuit or direct a verdict for the defendants.

I thought on the first reading of the case that it was opposed to the view which I have been endeavouring to present, and also to the conclusions I have come to as to rule 321, but on further consideration it appears to me to be a very strong authority for both my positions. In the first place there was no common law liability as common carriers; from the very nature of the contract there could not be, it was a contract not over the company's own line alone, but over other lines in France.

The plaintiff could not, as in this case, launch his case by proving that he was being carried by the defendants and paid his fare, and being obliged to rely on the contract he could not accept it in part and reject it in part; he proved the contract on which he was being carried, and that being produced shewed the defendants were not liable. It comes therefore within the principle of the case of *Watkins v. Ry-mill*, there being no liability and no contract beyond the ticket itself. It not being a case therefore in which the defendants would be liable as common carriers unless they succeeded in cutting down their common law liability by establishing a contract, but one on which the plaintiffs in order to succeed had to prove the contract, the learned Judge was wrong in leaving the question he did to the jury, but should have directed a nonsuit, and the Divisional Court upon that state of facts could, under the rule, do what the learned Judge at the trial ought to have done.

The signing of the ticket so far from carrying the case any further in favour of the defendants, in my opinion militates against them. It cannot of course be relied on as a contract because it is essential in every contract that there be volition; as pointed out in *Foster v. MacKinnon*, a man cannot be said to contract when he signs a paper upon a

representation and under a belief that it is different from what it turns out to be ; to make a valid and binding contract the mind must go with the act.

To hold that this Court can now disregard the findings of the jury, and enter a judgment for the defendants under rule 321, would, in my opinion, be in effect not merely to deprive the plaintiff of her right to have her case disposed of by a jury, but wholly to disregard their finding upon facts, which were peculiarly for them, and as to which it is impossible to say that as to them only one answer could properly be given.

I cannot believe that the Legislature ever intended to vest any such power in the Court, whose action should be confined strictly to those cases in which not only no additional facts remain to be proved, but in which upon the facts proved no jury would be justified in finding a verdict for the plaintiff.

See remarks of Lord Justice Thesiger in *Yorkshire Banking Co. v. Beatson*, 5 C.P.D. 127.

That that is also the general view is borne out by remarks of Mr Justice Stephen in *Watkins v. Rymill* to which I have just referred. He says: "Suppose that the case were sent for a new trial, and that the jury on the undisputed facts were to find that the defendant had not taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being a verdict which upon the evidence no intelligent men could justly return? We think it would, and that being so, it seems to follow that the question is one of law and not of fact. It is, in one sense, a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law." But we must bear in mind that he was there dealing with a case in which there could be no liability apart from the contract created by the receipt.

In a case like the present, where a party is entitled to be carried on payment of the fare demanded, the onus is entirely shifted; she is told for a single fare we charge so much,

for a return so much, nothing being said about the conditions except that the ticket is only good for forty days, and they bargain about nothing else. The Company assumes, as I have shown, in such a case the responsibility of cutting down their common law liability by agreement, and that is for the jury. If they fail in satisfying a jury of that contract they fail altogether. The defendants have not established that the condition was brought to the knowledge of the plaintiff, and no authority can be found for the Court in such a case assuming the functions of the jury and entering a judgment; on the contrary, it is only in cases where the Judge at the trial for want of evidence could have granted a non-suit or directed a verdict for one side or the other that the Court can exercise a similar power. That this is the proper construction to be placed on rule 321 is also borne out by the judgment in *Milissich v. Lloyds. Mellish*, L. J., there says (36 L. T. N. S. 423):

"I think this report may be fair or it may be unfair, but then is it a question of fact or law whether the report is fair or unfair? I think that it is a question of fact, and should be left to a jury to determine. Then the argument is, that the evidence is all one way, and that it is useless sending the case down for a new trial, because no jury could reasonably find the other way. In my opinion the Court must be very cautious not to take upon itself the functions of a jury. Notwithstanding the great powers given by the Judicature Acts it is still of course the province of the jury to determine between the credibility of witnesses on either side. Here, however, the question is more than what is the inference to be drawn from the facts proved in evidence."

Brett, J. A., in the same case says :

"It is a recognized rule that where there is some evidence. Judges will not interfere with the verdict, but where there is no evidence they will. If the matter is so conclusive that no reasonable man could find otherwise than in one way, then the Court as a matter of law should direct the jury to find in that way, but the moment a reasonable man might say that the jury might have found in favour of the plaintiff, then the question is for the jury. In this case I may have a strong opinion to which side the balance of



evidence inclines, but I cannot say that a reasonable man might not think otherwise."

In *Stewart v. Rounds* a County Court case (7 A.R. 517), decided by the Common Pleas Division sitting for this Court, it was held that there was no evidence to support the defence, and therefore that the Court could do as the Judge at the trial might have done, namely, direct a verdict for the plaintiff, but I fully agree in the remarks of Sir Adam Wilson in that case, the power is one to be most sparingly and cautiously exercised, and will not be exercised where there is evidence to go to the jury.

The remarks of Bowen, L. J., in *Toulmin v. Millar*, 12 App. Cas. 746, are to the same effect, and confine the right to interfere to cases in which the Court is satisfied that no jury could properly come to a different conclusion. It should be borne also in mind that the English rule, of which our rule 321 is a copy, has been amended, and the additional power given to the Court to "draw all inferences of fact" not inconsistent with the findings of the jury.

It appears to me, therefore, to be clear that the most the defendants could be entitled to would be to a new trial, and this could only be on the ground of misdirection on the part of the learned Judge, in omitting to ask the jury whether the company did what was reasonably sufficient to give the plaintiff notice of the condition. The Divisional Court might have sent the case back for a new trial to have that question disposed of, but not having done so I do not think we are called upon in this Court even to give that measure of relief, the more so as I think it would be impossible to say that a jury would not be fully justified in answering such a question in the negative; and I will go further, and say, that if I was disposing of this case as a juror, I should hold that under the circumstances the company had not done what was reasonably sufficient.

It is a very hard case upon the defendants, and the Legislature might well interfere so as to confine the recovery in such cases to a specified sum, unless upon payment of an increased rate of fare to cover the additional risk.

The question is important not only as to the amount involved, but in reference to the proper construction of Rule 321.

For these reasons I think that the appeal should be allowed, and the verdict of the jury and the judgment thereon restored.

*Appeal allowed with costs.*

BURTON, J. A., dissenting.

[This case has since been carried to the Supreme Court.]

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## REGINA V. THE CORPORATION OF THE CITY OF LONDON.

*Criminal procedure—Indictment for nuisance—Appeal—R. S. C., ch. 174, sec. 268—50-51 Vict. ch. 50 (D.)*

The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's Bench by *certiorari*, moved for a new trial, which was refused.

*Held*, that no appeal would lie to this Court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by *certiorari*, and tried on the civil side.

*Regina v. Eli*, 13 A. R. 526; *Regina v. Lalibertè*, 1 S. C. R. 117, referred to.

*Quere*, whether in any case of misdemeanor a new trial can now be granted, C. S. U. C. ch. 12, 112, 113—32 & 33 Vict. ch. 29, sec. 80 (D.)

THE defendants had been indicted for a misdemeanour for a nuisance, caused by draining certain sewers into the River Thames, and thereby fouling and corrupting the waters of the river.

After plea, the proceedings were removed by *certiorari* at the instance of the Crown into the Court of Queen's Bench.

The trial took place at London, in September, 1885, and the defendants were convicted. No points of law were reserved for the Justices of the Court for Crown cases reserved, but a new trial was moved for on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and for misdirection.

A rule nisi was granted, which, after argument, was discharged in December, 1886.

The defendants thereupon appealed to this Court, and the appeal came on for hearing on the 31st May, 1888.\*

*W. R. Meredith*, Q. C., for the appellants.

*Hutchinson* and *Aylesworth*, for the Crown.

On the argument Mr. Aylesworth renewed a motion which he had previously made, and which had been directed to stand over until the hearing, to quash the appeal on the

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

ground, that no appeal lay from the judgment of the Queen's Bench, discharging a rule nisi for a new trial in a criminal case.

September 12, 1888. OSLER J.A.—The objection taken by counsel for the Crown is, in my opinion, well founded.

If the right of appeal exists, it must be conferred by a Dominion Act, or by some Provincial Act prior to confederation.

Mr. Meredith argued that it was conferred by section 9 of Con. Stat. U. C. ch. 13, "An Act respecting the Court of Error and Appeal." That Act no doubt relates to the present Court of Appeal, and this section enacts that the Court shall have an appellate, civil, and criminal, jurisdiction throughout Upper Canada, and that an appeal shall lie thereto from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders, and decrees of the Court of Chancery.

In *Regina v. Eli*, 13 A. R. 526, an attempt was made to sustain an appeal to this Court from a judgment quashing a conviction, and it was pointed out and explained that the only appeal given by this section from the judgment of the Common Law Courts, was by way of assignment of error, upon the record of the final judgment, cf. Con. Stat. L. C. ch. 77 s. 56.

The only other section of the Act ch. 13, relating to appeals to this Court in criminal cases was section 29, which enacted that any person convicted of treason, felony, or misdemeanour, before any Court of Oyer and Terminer, and whose conviction had been affirmed by either of the Superior Courts of Common Law, might appeal against the affirmation, and the Court of Error and Appeal might make such rule or order thereon either in affirmance of the conviction, or for a new trial or otherwise as the justice of the case might require, &c.

As the law stood at the time of confederation, a conviction for treason, felony, or misdemeanor might be reviewed by one of the Superior Courts of Common Law either upon



points reserved by the Judge at the trial, under Con. Stat. U. C. ch. 112, or upon motion for a new trial under ch. 113, "An Act respecting new trials and appeals, and writs of error in criminal cases in Upper Canada"; see section 1; and it may be that section 29 of ch. 13, as consolidated, gave an appeal from the decision of the Superior Court in both cases to the Court of Appeal, although I think it was intended to confine it to the latter case, as it undoubtedly was confined before consolidation.

In 1869 the Dominion Statutes 32-33 Vict. ch. 29 section 80 repealed so much of ch 13 (and section 29 could be the only section affected) and of ch. 113, as allowed an appeal to the Court of Error and Appeal in any criminal case where the conviction had been affirmed by either of the Superior Courts of Common Law, on any question reserved for the opinion of the Court, and declared that the judgment of the Court on any question so reserved should be final and conclusive, and that so much of ch. 113 (and of ch. 77 of the Con. Stat. of Lower Canada) or of any other Act, as would authorize any Court in the Provinces of Ontario and Quebec, to grant a new trial in any criminal case was repealed as regarded any conviction had after the Act came into force. And by ch. 36 of the same session the Criminal Law Repeal Act, the said ch. 113 was repealed except three sections not relating to new trials.

In the schedule of statutes, &c., consolidated, appended to volume 2 of the recent Revised Statutes of Canada, section 29 of the Error and Appeal Act, ch. 13 C. S. U. C. is treated as having been repealed by section 80 of the Criminal Procedure Act, 32-33 Vict. ch. 29, [Vol. ii. p. 2323.]

To meet, in one respect, the changes effected by the Judicature Act in the constitution of the Courts, the Act 46 Vict. ch. 10, section 5 provided that when any question of law was reserved under the provisions of chapter 112 C. S. U. C. such reservation should be to the Justices of any division of the High Court of Justice for Ontario. R. S. C. ch. 174 s. 2 (*h*) ss. 259 to 264.

The Supreme and Exchequer Courts Act, 38 Vict. ch. 11, section 49,(D.) enacted that any person convicted of treason, felony, or misdemeanour before any Court of Oyer and Terminer or before the Court of Queen's Bench in Quebec on its Crown side \* \* whose conviction had been affirmed by any Court of last resort, or in Quebec, by the Court of Queen's Bench on its appeal side, might appeal to the Supreme Court against the affirmation of such conviction, and the Court might make such order therein in affirmance of the conviction or for granting a new trial, or otherwise as the justice of the case required, anything in the 80th section of the Criminal Procedure Act, ch. 29 to the contrary notwithstanding.

Thus the law stood when the proceedings which are the subject of appeal in this case were taken, and up to the coming into force of the Revised Statutes of Canada in March, 1887.

In *Regina v. Laliberte*, 1 S. C. R. 117, the prisoner was convicted of a felony, and on a case reserved for the Court of Queen's Bench, Quebec, (appeal side) the conviction was affirmed. Prisoner then appealed to the Supreme Court and the question was, whether that Court should simply reverse the judgment and discharge the prisoner or should direct a new trial, as it was contended the Queen's Bench might have done.

Richards, C. J., said :

"The effect of these repealing statutes (32-33 Vict. ch. 29 section 80 and ch. 36) is to take away the power of granting new trials in criminal cases and leaves the law applicable to Ontario and Quebec depending upon the provisions of ch. 112, C. S. U. C., and ch. 77, C. S. L. C., as to reserving questions at the trial for the consideration of the Court, as the same may be affected by section 80 and by section 49 of the Supreme Court Act.

"The object of section 80 taken in connection with ch. 36 of the same session \* \* seems clearly to have been to prevent in these Provinces new trials in criminal cases, and to leave questions of law to be decided on reserved cases as was and is the case in England."

“Looking at the numerous Acts affecting the criminal law passed in that session, it was no doubt, after deliberation, determined to make this important change in the law then existing in the two Provinces on the subject.”

It was held that an appeal lay to the Supreme Court from the decision of the Queen's Bench (appeal side) upon the point reserved notwithstanding section 80 declared that such decision should be final and conclusive; but that the conviction being bad, the Court could only reverse it, and discharge the prisoner, and could not grant a new trial, as the Court appealed from could not have done so.

This decision, as far as it goes, is adverse to the right of appeal in the present case.

If the repealing Acts which have been referred to deprived the Superior Courts of the right to grant a new trial after a conviction in all cases of misdemeanour, a right which did not, originally at all events, depend upon the ch. 113, C. S. U. C. (Ch. Crim. Law, p. 654. *Regina v. Fitzgerald*, 39 U. C. R. 297; *Regina v. Port Perry*, 38 U. C. R. 431; *Regina v. Russell*, 3 E. & B. 942; *Regina v. Duncan*, 7 Q. B. Div. 198.) the defendants' motion was unfounded and improper, and there is consequently nothing to appeal from. But if the right was inherent in the Superior Court independent of ch. 113, and was unaffected by the repeal of that Act the judgment of the Court upon the motion for a new trial must nevertheless be final as regards this court, if as seems clear, section 29 of ch. 13, has been repealed. Either way the defendants must fail. Even if they could have shewn that section 29 was in force the appeal must have been quashed, as it has not been allowed by the Court appealed from or two of the Judges thereof as required by the section.

It may be observed that in section 268 ch. 174, Rev. Stat. Can., which embodies that part of section 80 of ch. 29, which abolished the right of a new trial in criminal cases, the revisers have inserted the following proviso: “Provided that a new trial may be granted in cases of misdemeanour in which by law new trials may *now* be granted.”

If the right to a new trial depended upon ch. 113, which was repealed in 1869, the effect of this proviso, which re-appears in the new section substituted for section 268 by 50-51 Vict. ch. 50, may hereafter have to be considered. It does not affect the present case.

It was said that "the Court of last resort" mentioned in section 49, Supreme Court Act, necessarily meant the Court of Appeal, as the Court of Queen's Bench (appeal side) is referred to immediately afterwards. But the Provincial Court of last resort intended is, of course, that Court to which the right of appeal is given, and can only be given by the clearly expressed intention of the Legislature. As regards this Province, that Court is one of the divisions of the High Court. This is evident from the Criminal Procedure Act, R. S. C. ch. 174, section 2 (*h*) and sections 259 to 264. Questions of law which arise on the trial are to be reserved for the consideration of the Justices of the Court for Crown cases reserved. In this Province that expression means and includes any division of the High Court, and in Quebec the Court of Queen's Bench on the appeal side thereof. See Con. Stat. L. C. ch. 77, sections 56, 64. No other appeal is given.

It would not appear to be unreasonable that the decision upon an indictment for a misdemeanour like that in question here should be reviewable as fully as a decision in a strictly civil proceeding. The charge usually partakes more of a civil than of a criminal character, and large interests are frequently involved, and heavy responsibilities cast upon the municipal or other corporations affected.

The motion to quash the appeal must be allowed.

PATTERSON, J. A.—I have had an opportunity of reading the judgment prepared by my brother Osler on the question of the right to appeal to this Court from the judgment delivered in the Queen's Bench Divisional Court refusing to disturb the conviction for nuisance. I agree that the appeal does not lie for the reasons which he gives, and for those given in *Regina v. Eli*, 13 A. R. 526.



In *Eli's Case* the appeal attempted was from a judgment of the High Court quashing a conviction by a Justice of the Peace, which had been removed into the High Court by certiorari.

In the present case an indictment was found by a grand jury. It is said in the appeal book to have been removed by certiorari into the Queen's Bench Division of the High Court.

I do not gather from the book whether the indictment was found at a Court of General Sessions, or at a sitting of the High Court. It was probably the latter, and if so, the writ of certiorari would be, according to my apprehension of the present state of the law, unnecessary and inofficious; but the circumstance that the whole proceeding may have been in the High Court, does not extend the right of appeal so as to make the judgment reviewable by this Court.

I agree, therefore, that the appeal must be quashed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

*Appeal quashed with costs.*

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# BULL V. THE NORTH BRITISH CANADIAN INVESTMETN COMPANY AND THE IMPERIAL FIRE INSURANCE CO.

*Fire insurance—Mortgagor and Mortgagee—Subrogation clause—4th statutory condition—Assignment by way of mortgage—Proofs of loss—Waiver.*

The right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause referred to below, depends upon whether they have a good defence against the claim of the mortgagor, who as between himself and the insurance company is the party insured.

*Omnium Securities Co. v. The Canad. Fire and Marine Ins. Co.*, 1 O. R. 494, observed upon.

The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided.

*Held*, that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition: *Sands v. The Standard Ins. Co.*, 26 Gr. 113, 27 Gr. 167, approved.

*Held*, also, that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the condition.

After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objection to them for many months after, and gave no notice that any further proofs were required. When making payment of the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognise any claim on the policy by the mortgagor, by reason of non-compliance with the statutory condition as to proof of loss.

*Held*, that they must be taken to have dealt with the mortgagees as agents of the mortgagors, and that they had waived further proofs of loss; and that the payment enured to the benefit of the latter.

Judgment of the Court below affirmed.

THIS was an appeal by the defendants, The Imperial Fire Insurance Company, from the judgment of the Common Pleas Division, reported 14 O. R. 322; and came on for hearing before this Court, on the 11th of April, 1888.\*

*McCarthy*, Q. C., and *Wallace Nesbitt*, for the appellants.

*Maclennan*, Q. C., and *Urquhart*, for the North British Investment Company.

*Robinson*, Q. C. and *C. Millar*, for the plaintiff, (respondent.)

\**Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

The facts out of which the action arose, and the authorities cited, appear in the report of the case in the Court below and the present judgments.

June 29, 1888. BURTON, J. A.—The question in this case is, whether a payment of the insurance money made by the defendants, the insurance company, to the other defendants whom I will refer to as the investment company, was to be taken as a discharge of the mortgage which they held upon the plaintiff's property covered by the policy of insurance, or whether the insurance company were entitled upon such payment to be subrogated to the position of the investment company and to call for an assignment of the mortgage security.

The facts are very fully set forth in the judgments of the Court below, and I need not make any further reference to them than is absolutely necessary to make this statement intelligible.

By the terms of the mortgage held by the investment company, the plaintiff covenanted to insure the mortgaged premises, and to produce the receipt for the renewal premium to the company at least three days before the expiration of the insurance, failing which the investment company were entitled to insure and to charge the plaintiff with the premiums.

This is what in fact occurred, and the investment company accordingly, on the 7th August, 1880, obtained a policy from the Imperial in the name of the plaintiff for one year.

Default having been again made by the plaintiff in renewing the insurance, the company obtained a renewal on the 6th August, 1881, for a further period of one year.

The policy was subject to the usual statutory conditions, but it was also issued with a special agreement called the mortgage clause in these words:

"It is hereby especially agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of

the premises for purposes more hazardous than are permitted by this policy.

"It is also provided and agreed that the mortgagees shall notify the company of any change of ownership or increase of hazard (not permitted by this policy to the mortgagor or owner) on each renewal of this policy, and sooner, if the same shall come to the assured's knowledge, and shall, on reasonable demand, pay the additional charge for the same, according to the established scale of rates for the time such increased hazard may be or shall have been assumed by the company during the continuance of this insurance.

"And it is further agreed that whenever the Company shall pay the mortgagee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, said company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortgagee to recover the full amount of his claim; or said company may at its option pay to the mortgagee the whole principal due, or to become due, on the mortgage with the interest then accrued, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt."

We had to consider the effect of such an agreement as this in the case of the *Omnium Securities Company v. The Canada Fire and Marine Insurance Company* (a), although no judgment was delivered in that case, but the conclusion that I arrived at was, that as between the insurance company and the mortgagees the contract became in effect to all intents one of insurance of the mortgagee's interest, but as between the mortgagor and the insurance company the contract remained as if no such agreement existed, and that the right, therefore, of the insurance company to be subrogated to the rights of the mortgagee must depend upon whether they had or had not a good defence against the mortgagor, the person in whose name the insurance was effected. If they had a good defence, the money paid to the mortgagees would be so paid by reason of the agreement and that alone, if they had not, the money paid



would necessarily go in discharge of the mortgage, as the policy was effected for the mortgagor's benefit and at his expense.

The first ground of defence arises under the condition as to misrepresentation—the misrepresentation relied on being that the plaintiff had omitted to make known the circumstance that he was not interested in the property as the owner thereof, but had conveyed his interest in the same by deed dated 28th November, 1877, to certain parties named Glass and Wills, which was in fact an assignment to them for the benefit of creditors.

The Court below has dealt with this under a mistake of fact, having been under the misapprehension that the mortgaged premises were not included in the assignment.

But without entering into the question of whether a misrepresentation as to title (as to which see *Reddick v. Saugeen* 14 O.R. 506; *Sauvey v. Isolated Risk*, 44 U.C.R. 523), would come within the condition, is it a defence which can under the circumstance be given effect to? In considering this it becomes necessary to refer to dates.

The mortgage was given in June, 1877. The assignment for the benefit of creditors was executed on the 28th of the following month of November.

Default having been made in the payment of the premium of the then existing insurance, the investment company, on the 7th day of August, 1879, effected an insurance in the Imperial for \$5,000. That policy was cancelled, as I shall presently point out, after the first fire, and a new policy issued, which, or a renewal of it, was in force when a fire occurred in February, 1882.

Whether the Imperial had or had not at the time of the original insurance any knowledge that Bull had made an assignment, it is clear that before the issue of the reduced policy, that now in question, they were fully advised of the actual position of matters, for on the payment of the loss, \$3,278.25, they took not from Bull alone, or from Bull and the Investment Company, a cancellation of the old policy for \$5,000, but from Bull and from Wills, as trustee of his

estate. The insurance company do not pretend to claim that they are entitled to subrogation as to that sum of \$3,278, but having then at all events acquired full information as to Bull having only a resulting interest in the property they issue the policy now in question, and before the renewal of it on the 6th August, 1881, the property had, on the 31st July preceding, been re-conveyed to Bull.

Under these circumstances it seems to me that the defence of misrepresentation must fail.

The next defence is not borne out in evidence. It is under the 4th condition, which provides that if the property is assigned without the written permission of the company it shall void the policy, and claims that the plaintiff, by a conveyance dated the 28th August, 1881, granted and conveyed his equity of redemption to Wills, the facts being that the plaintiff executed a mortgage to Wills at that time of his interest in the property.

I feel satisfied that the decisions which confined the meaning of the word "alienee" to an absolute transfer of the property and held it not to apply to mortgages are equally applicable to the word "assign" used in the statutory condition, and that it is unreasonable to suppose that the framers of the conditions could have intended to impose upon the owners of property the vexatious burden of seeking the written permission of the insurance companies on every occasion upon which they desired to effect a small temporary loan upon the security of the premises insured.

The same remark applies to the sale of the property made to Wills under the power of sale, but which was never perfected by a conveyance.

Mr. May, page 291, referring to a case in 11 Barbour, N.Y.S.C., 624 (a) in discussing the meaning of the word, says: "It has been said to import a conveyance of the title, and that nothing short of this would amount to an alienation. \* \* An agreement, therefore, to sell, though in writing and with delivery of possession, and receipt of part of the purchase money in payment, is no alienation so long

as the title has not passed," and refers to a number of authorities.

The subsequent insurance by Wills referred to in the 9th paragraph of the defence was an insurance upon a different interest, and cannot be set up to avoid this policy.

The only remaining defence relied on was the want of sufficient proof of loss. I do not pause to inquire whether they were or were not in any respect defective, and whether an action could have been resisted on that ground. The company could waive the proofs and pay without, and that is what they have done. After such a payment the only question that can arise is whether that payment enures for the benefit of the mortgagor, or, the policy as to him being void, the company are entitled to be subrogated to the position of the mortgagees.

I have already pointed out that all the objections to the mortgagor's right to recover on the policy fail, and he is, therefore, entitled to the benefit of the payment.

As to the claim for the return of the money in consequence of its having been paid under a claim of subrogation it is involved in the decision that they were not entitled to subrogation. The company could not by making a claim to subrogation entitle themselves to it or to a return of the money, if in point of fact they were liable upon the policy itself.

I am of opinion, therefore, that the judgment below is, right and should be affirmed. The insurance company should pay to the plaintiff and to the investment company the costs of this appeal.

OSLER, J. A.—The plaintiff brings this action to compel the defendants, the investment company, to discharge a mortgage made by him to them on the 27th June, 1877, which was, as he contends, in part paid by the proceeds of a policy of insurance they effected in his name on the 7th August, 1880, with the other defendants, the Imperial Insurance Company, pursuant to a covenant in the mortgage, by which the mortgagees were authorised to insure if the mort-

gagor failed to do so. The insurance company contend that as against the mortgagor they were not liable to pay the loss, and therefore claim to be subrogated to the mortgagees' right under the mortgage at the time they paid it, pursuant to the subrogation clause in the policy.

The plaintiff is entitled to relief unless the insurance company can shew that, as between themselves and the mortgagor, some valid defence existed against his claim on the policy.

The defences pleaded and relied upon are: 1. Under the statutory condition, that the plaintiff omitted to make known to the company a circumstance material to the risk, viz., that he was not interested in the insured property as owner at the time of the insurance, but had conveyed his interest therein by deed of the 28th November, 1877, to certain persons named Glass and Wills.

2. Pleading the 4th statutory condition, and that subsequent to the insurance viz., on the 20th of August, 1881, the plaintiff granted and conveyed his equity of redemption to Wills without the written permission of an agent of the company indorsed upon the policy. This is also pleaded as a change material to the risk.

3. Pleading the same conditions, the defendants also set up a sale by the investment company of the insured premises on the 19th November, 1881, to Wills under the power of sale in their mortgage. This having been done without the consent of an agent indorsed upon the policy avoids it, as the insurance company contend.

4. A subsequent insurance by Wills, the alleged purchaser, without the assent of the insurance company also, as it is contended, avoids the policy.

5. The non-compliance by the plaintiff with the statutory conditions as to proofs of loss is also pleaded.

Some of the defences pleaded, and others, such as the insurance in the Queen Insurance Company, might have proved formidable, if they had been raised to the defendants' former policy of the 7th August, 1879, but that policy is no longer in existence, and all the defences must come



up to the subsequent policy of the 7th August, 1880, which is the policy now in question.

That policy was granted as the former one had been, upon an application proposed by the investment company in the name of the mortgagor, Bull, as owner, the loss to be payable to them as mortgagees. At that time the property had, by deed of the 28th November, 1877, been conveyed by Bull to Glass and Wills, as trustees upon certain trusts for sale for the benefit of his creditors; but it is clear that the insurance company had notice of the conveyance before they granted the present policy of the 7th of August, as there is an indorsement bearing date the 23rd June, 1880, upon their former policy of the 7th August, 1879, for \$5,000, of the settlement of a loss which had occurred under it, and of its cancellation to that extent, which is signed by Bull, and also by Wills, who is described as trustee of the estate of G. L. T. Bull.

Bull therefore, subject to the mortgage and trust deed, was the equitable owner of the premises and as such had an insurable interest—*Clark v Scottish Imperial Insurance Company*, 4 S. C. R. 194. It was said that this interest was a merely nominal one, but of that there was no evidence.

The first policy appears to have been wholly cancelled after the 23rd June and given up to the insurance company, who, upon the application of the 7th August, 1880, issued the new policy for \$1,750, the residue of the risk which had been outstanding upon the former one.

The first defence pleaded therefore fails. There was neither misrepresentation nor concealment of any material fact.

On the 30th July, 1881, Glass and Wills, the trustees, reconveyed the trust estate to Bull by deed of that date, reciting that the creditors had been settled with, and that Bull was entitled to a reconveyance.

On the 20th August, 1881, Bull conveyed the insured property to Wills by way of mortgage. This is the defence secondly relied on.

The 4th statutory condition provides that if the property insured is assigned without a written permission indorsed on the policy by an agent of the company, duly authorised for that purpose, the policy shall be void: but this condition does not apply to change of title by succession, or by the operation of law or by death.

It was held in *Sands v. The Standard Insurance Company*, 26 Gr. 113, affirmed on rehearing 27 Gr. 167, that a mortgage was not an *assignment* within this condition, and that what it applies to is an assignment which effects a change in the title, not one which merely creates an incumbrance. This view was also taken by Mr. Justice Henry in the Supreme Court in *McQueen v. The Phoenix*, 4 S. C. R. 660, 668. He says: "The assignment contemplated I take to be one by which the assignor divests himself of all title and interest. The words are 'If the property is assigned, which means wholly transferred.'"

The authorities referred to in *Sands's Case* support the judgment of the Court, and I see no sufficient reason for restricting the meaning thus given the word to cases in which mutual insurance companies were defendants.

The latter part of the condition also strongly indicates that the whole is directed against a change of title merely. Where that is brought about by the act of the parties consent is required, otherwise not. The defence on this ground also fails.

Nor can the third and fourth defences be maintained.

The agreement between the company and Wills at the auction sale under the power of sale in their mortgage was never carried out and was abandoned, and cannot therefore be set up as an assignment of the property within the 4th condition.

And the fact that Wills obtained an insurance from another company, whether he did so as owner or as second mortgagee, is one which cannot concern the insurance company.

The remaining defence is that which sets up non-compliance with the condition as to proofs of loss. I have no

doubt that the defendants are not in a position to rely upon that condition.

They insured the mortgagor, not the mortgagee, and must be taken to have known from the terms of the application and of the policy that the mortgagor was the party insured, and would therefore ultimately be entitled to the benefit of the insurance, unless they could shew that as against him they had some substantial defence which would enable them to be subrogated to the rights of the mortgagees.

A fire occurred on the 24th February, 1882, and proofs of loss prepared by the mortgagees on a form supplied by the company were received by them towards the end of March. No objection was made to these proofs by the company, nor was any notice given by them either to the investment company or to Bull that any other claim and proofs of loss were required until December, 1882.

On the 4th September they tendered the amount of the policy to the investment company, claiming that there was no liability to the mortgagor or owner, and demanding to be subrogated to the rights of the mortgagees.

The amount tendered was paid on the 23rd December, and on the same day the adjuster, one Lye, forwarded to the solicitor of the mortgagees a declaration which probably accompanied the draft for the amount, stating that the company *had paid* the mortgagees \$1,750, being the amount of the policy issued to G. L. T. Bull.

The grounds on which the company claimed to be subrogated to the rights of the mortgagees were then for the first time set forth in detail, *inter alia*, that Bull had never made claim on the company in accordance with the statutory conditions, 11 to 13 inclusive.

Up to the time, therefore, of the actual payment of the loss, the company did not, though proofs of loss had been duly received by them, object to its payment on the ground of imperfect compliance with the conditions as to proof, or notify the assured that the statement was objected to or was defective in any respect. It is in my opinion too late

for them to take the objection now. An insurance company cannot be permitted to settle the loss with the mortgagees upon a policy of this kind, raising no objection to the proof, and then turn round upon the mortgagor and assert that the conditions of proof of loss have not been properly complied with. They must be taken to have dealt with the mortgagees as agents of the mortgagor, and to have accepted, as sufficient for both parties, the proof they were content to take from the mortgagees.

I think the appeal should be dismissed.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred in the result.

*Appeal dismissed with costs.*

[This case has been since carried to the Supreme Court.]

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## DONOVAN V. HOGAN.

*Assessment and taxes—R. S. O. (1877), ch. 180, secs. 114, 129, 130, 131, 155, 156—Tax sale, invalidity of—Limitation of time for impeachment—Payment of taxes—Resident and non-resident roll—Distress for payment of taxes.*

The two years limited by section 156, R. S. O. 1887, ch. 180, for impeaching a tax sale run from the time of making the tax deed, not from that of the auction sale.

The word *sale* in that section can be properly understood only in the sense of conveyance.

*Hutchinson v. Collier*, 27 C. P. 249; *Church v. Fenton*, 28 C. P. 204, approved of. The contrary view expressed in *Smith v. Midland*, 4 O. R. 493; *Lyttle v. Broddy*, 10 O. R. 530; *Claxton v. Shibley*, 10 O. R. 295; and *Deverill v. Coe*, 11 O. R. 222, dissented from.

Unoccupied land divided into lots was assessed for the year 1879, and entered in the non-resident division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued, and without the name of the owner, it was entered with the name of the owner prefixed, and valued *en bloc*.

The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax roll, and transmitted to the county treasurer. The owner became also the occupant of the lands, before the delivery to the collector of the collector's roll for 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned them to the county treasurer in a "list of non-resident taxes returned from the collector's roll," and they were so entered in the treasurer's books. In the treasurer's list of lands liable to be sold for arrears of taxes in 1882, sent to the township clerk, the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed, as occupied land, for the years 1880, 1881, and 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to section 111, in the list of non-resident lands, which appeared by the assessment roll of 1882 to have become occupied.

The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation, and being ignorant of the sale or that the taxes were alleged to be in arrear:

*Held*, (1) that the taxes having been entered in the collector's roll, with the name of the person assessed, the payment to the collector was valid, and, consequently, that there were no taxes in arrear for which the land could lawfully be sold:

(2) The duties of the assessor and township clerk, under sections 109, 110 and 111, are imperative and not directory merely, and their performance is conditional to the validity of a tax sale.

[BURTON, J. A., dissenting on this point.]

*Per* PATTERSON, J. A., *semble* under the circumstances in evidence the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155.

The judgment of FERGUSON, J., affirmed.

THIS was an appeal by the defendant from the judgment of Ferguson, J., setting aside a sale for taxes under the circumstances fully set forth in the present judgments; and came on for hearing before this Court on the 23rd of November, 1887.\*

*Moss*, Q.C., and *James E. Robertson*, for the appellant. More than two years had elapsed after the sale of the lands in question before this action was commenced; and thereby the sale and the deed to the defendant became valid and binding. The assessment in respect of which the lands in question were sold, was in pursuance of and under the authority of the Assessment Act in force in this Province, the same having been due for three or more years preceding the sale thereof, and the same not having been redeemed in one year after the sale as provided by the statute, the plaintiff cannot now be heard to impeach the conveyance made for the purpose of carrying out that sale: *Claxton v. Shibley*, 10 O. R. 295; *Smith v. Midland*, 4 O. R. 494; *Lyttle v. Broddy*, 10 O. R. 550.

*Delamere* and *English*, for the respondent. The evidence at the trial clearly established that the taxes for which the property was assumed to be sold had been fully paid to the proper officer to receive them; this being so and there being no taxes due no sale could be valid: and *Hutchinson v. Collier*, 27 C. P. 249, and *Church v. Fenton*, 28 C. P. 384, shew that this action was brought in due time, and *Deverill v. Coe*, 11 O. R. 222, clearly determines that in order to make such sale effectual there must be taxes legally due, and legally in arrear before sections 155 and 156 of the R. S. O. ch. 180, could in any way affect the case. They also contended that the conditions of sale contained in secs. 108, 109, 110, 111, and 112 of R. S. O. ch. 180, had not in any way been observed, and further that the land had not been properly assessed: *McKay v. Cryslar*, 3 S. C. R. 436.

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

April 3, 1888. HAGARTY, C. J. O.—This suit to set aside a sale for taxes, was commenced 7th January, 1886.

The sale was 30th December, 1882 ; deed, 15th February, 1884.

The suit was therefore brought within two years from the execution of the deed, but not within two years from sale.

I adhere to the opinion expressed by me in *Hutchinson v. Collier*, 27 C. P. 249, that the two years are to be reckoned from the deed.

See the remarks thereon by Mr. Justice Gwynne, at p. 404, of *Church v. Fenton*, 28 C. P. He points out "what the section deals with is the validity of a deed made in pursuance of a sale."

I am aware that other Judges have expressed a different opinion, but I feel strongly that it is the validity of the deed that is the governing subject of the legislation, and that the Legislature never could have intended to reckon the time from the sale, which was only a conditional sale liable to be defeated by payment within a year, and only made complete by default therein. Great injustice might be worked by a contrary construction. Two years might elapse between the sale and execution of the deed, yet then it would become free from question forthwith.

The learned Chancellor, in *Smith v. The Midland R. W. Co.*, 4 O. R. 498, holding that the Statute of Limitations did not begin to run until the period for redemption had expired, when he could have obtained his deed, adds: "The statute did not commence from the date of the tax sale, and during the pendency of the certificate of sale, but only from the time when the right of redemption ceased. There is a qualified ownership during the year of redemption, to protect the property from spoliation and waste, but the estate is not vested in the purchaser till the execution of the deed." The same learned Judge in *Claxton v. Shibley*, 10 O. R. 295, differs from the decision in *Hutchinson v. Collier*.

As I understand the case, it depends altogether on the

decision in *Deverill v. Coe*, 11 O. R. 222, and if the law be there stated correctly, this appeal must be dismissed.

Three lots were put up for sale. They were part of a block owned by Coe. At the sale one lot was bought by Deverill; one by Hovey, and the other by defendant Hogan. Only one bid for each lot. No proof of any collusion between the buyers.

The three lots appear on the non-resident roll for 1879. A list was sent to the township clerk, and it is expected that he will return a list of any of the lands that are occupied. It was returned to the county treasurer as "R. Coe, sub-division of lot 38, 2nd con. from Bay—plan 426, lot 14; 3  $\frac{54}{100}$  acre, for the year 1879. This lot was returned, he says, in that year along with two others, in the same name, lots 12, 13, and 14. Wilson was collector for 1879. There is no return for 1882, from the township clerk shewing these taxes in arrear. No return from the township as to these lots, since the return for 1879.

He says he sent returns in February, 1882, that these lots were liable for sale; and as he had no return that they were occupied, or that the taxes could be collected, they were put in the list for sale.

They were sold December, 1882. Lester, the township clerk, proved that he got the list in 1882 from the county treasurer; Coe was down for these lots 12, 13, and 14—taxes due for 1879.

He remembers putting these lots as in arrear only one year. The rolls were for 1881, 1882, 1883—the rolls for 1879 and 1880 were burned.

The treasurer produced Wilson's roll for 1882. Coe's name appears there and taxes paid. Rolls for 1881, 1882, and 1883, shew nothing about arrears. Wilson died, and Brown became collector for 1883, having been assessor for many years. He proves Wilson's signature to the receipt for the taxes in 1882, and Coe paid Brown for 1883 and since.

It appears that Wilson was in default to the township for many receipts for taxes.



In January or February, 1880, there was an occupied house on the land and chattel property.

Coe's house was burned in 1880, and the council remitted the taxes for that year. Brown cannot remember receiving any list of arrears as Mr. Lester swears in 1882.

Brown, as assessor, knew of Coe's occupancy in 1880 and since.

Mrs. Coe swears she paid the taxes to Wilson, the collector, for 1879, and that she and her husband went to live there in June or July of that year. They had furniture and chattel property upon them always. Their house was burned in 1880, and they began rebuilding the next week, and they re-occupied in about a month, and always had plenty of chattels there; never heard of any other demand for taxes. Her husband corroborated her statement.

The receipt was burned in Coe's house in 1880.

The trial Judge found as a fact that the taxes for 1879, were paid to Wilson, the collector.

The point relied on, besides the lapse of time by the tax purchaser was, that the payment to Wilson was wholly void as being on non-resident land; he had no authority to receive it.

The case is very peculiar in its circumstances.

I think it is proved that in fact the actual occupant of the land in 1879, did pay that year's taxes to Wilson, the township collector.

They appeared in the county treasurer's books as non-resident (under Coe's name) in 1879.

No return respecting them appears in that office since 1879. Many of the township records were burned in the town hall in 1881.

Brown swore he assessed the land as non-resident in 1879, seeing nothing on it. There was no separate non-resident roll; but "at the end of the assessment roll there are spaces to put non-resident lands in."

It is highly probable that on the collector's roll in Wilson's hands for 1879, Coe duly appeared there as owner or occupant, with the amount assessed opposite to his name,

and that the tax was collected from him without any notice of his being non-resident.

There is no direct evidence as to the true state of the collector's roll for 1879, as it was burned. It may have been solely owing to a mistake that it was returned as non-resident to the treasurer.

In February, 1882, the county treasurer returns this land as three years in arrears for non-resident taxes, *i. e.*, 1879, 1880, 1881. Then after receiving it, the township clerk in each year gives the list to the assessor, and it is the assessor's duty if such lands are occupied, or are incorrectly described, to notify such occupant, &c., upon their respective assessment notices that the land is liable to be sold for arrears of taxes, &c.

We have before us the assessor's notice to Coe of the taxes for 1882, delivered to him 21st April, 1882.

It is merely the ordinary assessment for the year 1882 and contains no entry whatever as to any arrears of taxes under the column headed "non-resident," is written "Res."

We also have similar assessment notices for 1883, 1884, and 1885. No one of them containing any notice as to arrears.

Then in 1882 we have the collector's bill of taxes for that year delivered to Coe receipted as paid, by Wilson, the collector. The date at the head is November 28th, 1882, and a like receipt from Brown, collector, for 1883 and 1884.

The warden's warrant for sale, is dated 20th September, 1882.

We have a clear violation of the statutable directions as to a case like the present, and its violation, if allowed to be committed with impunity, has unquestionably caused the loss of plaintiff's land.

The notice prescribed for his protection, if given to him either in 1882 or 1883, would have saved his property.

It is impossible to fix any blame on him. There was no tax payable until 1879, and the collector for that year received the amount from him as the 1879 tax.

It seems idle to assert that he should have ascertained before paying Wilson, (known to be the collector,) whether the tax demanded, was, or was not such as that official was legally entitled to receive. There was nothing in any way calculated to induce any ordinary man to suspect that the land had been returned as non-resident and in arrear as for assessment for that year, he being, for the last half of it, actually living on it with distrainable property.

I cannot believe the law can be so hopelessly defective as to permit an injustice so flagrant and inexcusable.

The judgment of my learned brother Armour, in *Deverill v. Coe*, points out in very vigorous language, how this provision as to arrears and notice was declared by the Legislature to be enacted for the greater protection of persons owning non-resident lands, and also for the more sure collection of the taxes thereon; and he holds its performance to be a condition precedent to the right to sell the lands for arrears. He adds:

“The township officers wholly neglected their duty, and did not even pretend to observe these provisions; and as these officers are the officers of the very municipality for the benefit of which these taxes were to be collected, I do not think the defendant's land should be practically confiscated through their neglect.”

Wilson, C. J., has very elaborately and fully discussed the case in all its bearing, and comes to the same conclusion as to the fatal effect on the tax title of the assessor's omission to give the notice.

It would be useless to repeat in this case the reasons so carefully and fully set out in his judgment. He suggests every doubt and difficulty created by the statute. He seems to consider that in his view the limitation of time for questioning the deed is to be reckoned from the sale, not the deed; but he considers that, notwithstanding this view, the sale can still be questioned.

He notices that other Judges seem to consider that the default of subordinate officers, e. g., assessors and collectors, will not vitiate the sale.

In the case of a vital statutable provision causing the whole damage, as in the case before us, I cannot see any sound distinction between the rank of different functionaries by whom the general machinery of the law is worked. Nor can I consent to condone the neglect of the township subordinate of a duty which would be unpardonable if committed in the loftier atmosphere of the county official.

The neglect has been equally disastrous to the owner, and may be said to be the proximate cause of his losing his estate if this sale be upheld.

I think the appeal should be dismissed.

BURTON, J. A.—So far from agreeing with the learned Chief Justice in the Court below, that Wilson the collector had no authority to receive the taxes on the lot in question in 1879, I think the evidence tends to shew that this lot was on the *collector's roll* for that year, and that it was his duty to collect it.

The collector has nothing whatever to do with the non-resident roll, and it is never in his possession or under his control.

The rolls for 1879 and 1880 are unfortunately destroyed. But we must take judicial notice that it is the duty of the clerk of every local municipality to prepare two rolls, in one of which he sets down the name of every person assessed, and the assessed value of his property, and certain other matters in detail; and this roll it is his duty before the 1st October in each year, to deliver to the collector.

In the other roll he enters the lands of non-residents whose names have not been set down in the assessor's roll, and the value of each parcel, and the rates or taxes with which the same are chargeable, and this roll it is his duty to transmit to the treasurer of the county.

The collector, upon receiving his roll, is required to make a demand upon the person assessed for the amount of taxes assessed against him; and in the event of default, to distrain, and in the case of non-residents who have reques-



ted to be placed on the roll, he is to transmit a demand by post, and after the expiration of one month from the delivery of the roll, and after 14 days from the transmission of the demand, may distrain upon any property on the premises.

Now I think there is some little confusion in the minds of some of the Judges about the contents of these rolls; some of the witnesses referring evidently to the assessment rolls and not to the collector's rolls, when speaking of the resident and non-resident lands being on the same roll; that is the legal and so proper mode of preparing the assessment roll. It is one roll but divided into two sections, one headed resident and the other non-resident, but not so in the case of the collector's roll.

Bearing this in mind, a good deal of the misapprehension as to Wilson's right to receive the tax for 1879, disappears. Whether in point of fact he did receive it, was purely a question of fact, and there was evidence to support the finding of the learned Judge, that he did receive it. Notwithstanding Brown's evidence that he assessed these lots in 1879 as non-resident, it is clear, I think, that if he did so, he did not comply with the directions of the statute, but assessed them as if the owner was resident in the municipality, and so it properly found its way into Wilson's roll in the fall of that year.

The course of proceeding by the collector, in the event of his being unable to levy the tax, is to deliver to the township treasurer an account of all the taxes remaining due on the roll; and on making oath before him that there was no property to distrain, those taxes remaining unpaid are credited to him.

It then becomes the duty of the township treasurer before the 8th April in each year, to furnish the county treasurer with a statement of all unpaid taxes directed in the collector's roll to be collected.

This statement was furnished to the county treasurer in April, 1880, and affords clear evidence, not only that this lot was on the collector's roll for 1879, but that Coe was assessed for it.

This, therefore, with the finding of the learned Judge that they were paid to Wilson, is sufficient to dispose of this case.

I do not wish, however, to appear to acquiesce in the law laid down by the Chief Justice of the Queen's Bench, and approved of apparently by the learned Chief Justice of this Court, that the duties cast upon the clerk and assessors under section 109, and subsequent sub-sections of the Assessment Act, are conditions precedent to the right to sell non-resident lands for taxes, whilst I am clearly of opinion that the omission of the treasurer to comply with the requirements of the law in furnishing the local clerks with lists of lands three years in arrears, would invalidate the sale; but I do not base my opinion on the notion that the one officer held a higher official position than the other, but on the broad ground that, in the one case the statute contains a clear prohibition against selling at all, unless such lists are furnished, and against selling any lands which have been returned as occupied under section 111, and because there is provision made under section 115 for punishing the subordinate officials for breach of their duty. But there is a further reason for believing that the Legislature could not have intended that any such effect should be given to the default of the subordinates, viz., that it would introduce an element of uncertainty in the transfer of property, and the investigation of titles, one link of which happened to be a tax-deed, that never could have been seriously contemplated by the legislature. A solicitor meeting with such a title can at once, by inquiry at the treasurer's office, ascertain whether the law has or has not been complied with; but there are no means of ascertaining whether the assessor has done his duty.

I think for the reasons given, the sale was invalid, and that the appeal should consequently be dismissed.

PATTERSON, J. A.—The defendant's case cannot be said necessarily to stand or fall with the determination of the

question whether or not the taxes for 1879 were paid by Coe. If they were paid, that fact is fatal to the defendant's title, but if the payment should not be held to be satisfactorily established it by no means follows that the tax title is valid.

I am satisfied that the true result of the facts, in connection with a correct understanding of the statute, is that Wilson, the collector for 1879, was authorised to collect those taxes, and that they were duly paid to him.

I shall not discuss the details of the evidence on this branch of the case, which have been noticed by my brother Burton and will be more fully dealt with by my brother Osler, but shall content myself with expressing my concurrence in their views.

The confusion seems to have arisen from the local officials calling that a non-resident roll which was not the roll to which that designation properly belongs.

The contention of the defendant is, that in 1879 the land was assessed as non-resident land, and the validity of the tax sale, even on that assumption, is contested on this appeal, as it was in the Court below where it was held to be invalid.

One point of great importance in that aspect of the contest is the application of section 156 of the Assessment Act, R. S. O. ch. 180.

The action was commenced within two years after the date of the deed from the warden and treasurer, and more than two years after the sale by auction.

I am of opinion that the word "sale" in section 156, can only be properly understood as used in the sense of "conveyance."

I agree with the views of his Lordship, the Chief Justice, as expressed in the judgment delivered by him in 1877 as the judgment of the Court of Common Pleas, in *Hutchinson v. Collyer*, 27 C. P. 249. That judgment was affirmed by the same Court in 1878, in *Church v. Fenton*, 28 C. P. 384, 404; but the construction of the section does not seem to have been so fully accepted as to relieve us from considering it in this Court.

In *Ferguson v. Freeman*, 27 Gr. 211, 215, Spragge, C., intimated (in 1879) some doubt as to the effect of the section. In *Claxton v. Shibley*, 10 O. R. 295, the present Chancellor, while he did not consider the question open, disapproved of the view taken by the Court of Common Pleas; and though the judgment of that Court was accepted and acted on in the Common Pleas Division in *Lyttle v. Broddy*, 10 O. R. 550, and in the Queen's Bench Division in *Deverill v. Coe*, 11 O. R. 222, which is really the judgment in review upon this appeal, Wilson, C. J., doubted the propriety of the construction.

There was no room for uncertainty in the provision as it was expressed in the Act of 1866, 29 & 30 Vict. ch. 53, sec. 156, where it first appeared.

The limitation there was "four years after the passing of this Act, when the land was sold and a deed given by the sheriff before the passing of this Act, or within four years from the giving of such deed when such sale shall take place or deed be given after the passing of this Act."

In the Act of the Legislature of Ontario, passed in January, 1869, 32 Vict. ch. 36, sec. 155, the language was not so explicit, but I think it sufficiently appears that the effect was intended to be the same. It was, "Within two years after the passing of this Act, when the land was sold and a deed was given by the sheriff or treasurer before the passing of this Act, or within two years from the time of sale, when such sale shall take place after the passing of this Act."

"Sale," in this last passage, must mean conveyance. If not, there was no provision, as there had been in the clause in its former shape, for cases where the sale was before the Act, and the deed not made till after the Act. The doubt of Spragge, C., in *Ferguson v. Freeman*, was whether that was not a casus omissus. That no such omission was intended appears from the application of the limitation to cases completed by conveyance before the Act passed. In those cases two years were allowed after the passing of the Act to impeach the deed, while in a case in which the sale may have been a year old when the Act passed and



the deed made the day after its passing, or even if the sale had taken place only the day before the Act passed, the deed would, on the strict construction of the word "sale," be absolutely binding. No reason can be suggested for the distinction between the two classes of cases; and no distinction exists if by "sale" we understand the conveyance to be intended.

The further consequences involved in reading the word as denoting the auction and not the conveyance, are too unjust to have been contemplated by the legislature.

The two years' time is given to question the *deed* before a court. But the deed cannot be given short of one year after the sale, and may not be given until after two years, and so the owner may be barred by failure to do what he could not by any possibility have done.

What Sir Adam Wilson said in *Deverill v. Coe*, was:

"But I doubt whether the two years count from the date of the deed. The sections say *from the time of the sale*, and the sale referred to is the sale by the treasurer. The deed is the *evidence* of the sale."

It is true that the treasurer alone conducts the sale, and the warden joins with him in making the deed; but, with great respect, I am unable to see that that affects the argument as to the proper force to be given to the word "sale," as here employed. It happens, moreover, that section 156 takes no note of the intervention of the warden. It speaks only of the treasurer giving the deed, and makes *such* deed binding unless questioned in time. Nor do I see the force of the consideration that the deed is only evidence of the sale. I am not prepared to concede that that is the only office of the deed of the warden and treasurer; but whatever the office of the deed may be, it is the *deed* that is made binding by the terms of the section, not the sale apart from the deed.

The real question is whether the language can, by a fair process of exposition and without usurping legislative functions, be construed so as to give effect to what appears to be the purpose of the section.

It was certainly unfortunate that in re-drafting the section from the Act of 1866, the word "deed" was dropped and the word "sale" alone adhered to. But while that word is more commonly used in the Assessment Act to denote the auction at which the bidder acquires an interest, defeasible by redemption within a year and requiring to be perfected by a conveyance executed, not by the treasurer only, but also by the warden, yet the word itself carries the idea of a change of property, and in that sense includes the operation of a conveyance. It is therefore capable of expressing or indicating the final act of transfer, if other legitimate considerations point to that as the sense in which it is intended to be used.

I think we can, without unjustifiable violence, so construe it here, and that we ought to do so.

On the other view of the enactment, I do not see why the deed should have been referred to in the section. The object would have been reached as effectually and more simply by a direct declaration that no tax sale should be questionable after the lapse of two years.

Section 155 has been also a subject of discussion.

There is no issue raised upon the record with respect to either of these sections. The only allegation of fact in the statement of defence which touches the validity of the sale is that the taxes were in arrear.

If section 155 is relied upon to cure irregularities in the procedure leading up to the sale, it ought to be pleaded.

One essential to its application is that the sale was openly and fairly conducted, and that is, as I apprehend, to be affirmatively established by the person who appeals to the section in support of his title, and ought to be affirmatively alleged in his pleading.

The defendant is scarcely in a position to insist that that fact should have been found in his favor. There is no finding on the subject.

In his judgment in *Deverill v. Coe*, which proceeded on the same evidence on which this action was tried, Sir Adam Wilson intimated that if he had not, on other

grounds, come to the conclusion that the sale could not be supported, he would have been in favour of giving the defendant an opportunity, if he desired it, of trying the question whether the sale could be allowed to stand, or could in law be said to have been fairly conducted, when three or four acres of land, worth three or four hundred dollars, were sold for only four dollars and four cents.

In that action the claimant under the tax sale was plaintiff, and was trying to recover possession of the land from the man who had the paper title; and it strikes me that, if the observations I have quoted are correctly reported, his Lordship must have for the moment lost sight of the position of the parties, because, unless my apprehension of where the onus of proof lay is incorrect, it was for the plaintiff there, as for the defendant in this action, to establish the condition precedent to the operation of section 155.

It may be difficult, and it would not be wise to attempt, to define the full force of this expression "openly and fairly conducted." The facts of each case must necessarily be dealt with by themselves. I have a strong feeling that something more must be required than easy-going uninquiring honesty on the part of the official who sells. I dare say it is the case in many, perhaps in most, of these sales that the person who sells knows nothing of the land he is selling beyond what is printed in the advertisement; and I can suppose it possible that purchasers may bid on mere speculation without having informed themselves of the nature or value of the land they are bidding for.

I do not think that is a state of things intended or contemplated by the Act. Section 137 proves the contrary when it requires the treasurer to sell in preference such part of the land as he may consider best for the owner to sell first, and when the mode of sale it prescribes is a bid for the smallest quantity of the land for which the purchaser will pay the taxes mentioned in the advertisement. Some knowledge of the land on the part of both vendor and vendee is obviously counted on.

It may be that where neither party has such knowledge, but both act in the dark, a sale may be hard to disturb if everything leading up to it has been formal and regular. As to that I offer no opinion.

But where irregularities are to be condoned, and the sale when followed by a deed, made unimpeachable, provided the sale has been openly and fairly conducted, that condition cannot reasonably be narrowed to the absence of evil motives or to active misconduct on the part of the official.

The fact that to sell for taxes and to sacrifice the land sold are usually synonymous terms may not be disputable if the history of these sales is the criterion, but we must not attribute that result to the intention of the legislature. What is aimed at is that these sales shall be conducted as ordinary business transactions are where property is sold by auction with a view to obtain its fair market value.

The explanation at the end of section 155: "It being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof," does not mean that a man whose taxes are three years in arrear is to forfeit his land. Read, as it must be, along with the rest of the section, and giving proper significance to the condition as to the sale, we have the idea conveyed that the land having been sold at a fair and open sale, the sale being openly and fairly conducted, and the land therefore presumably having brought its value, the owner who failed to pay his taxes has to be content with that result.

It is a misnomer, to speak of a fair sale when neither the man who sells nor the man who buys knows anything the article sold.

We may assume, in favour of the good faith of the parties, that that was the case with regard to this land within a few rods of the city, and said to have been three years before worth at the assessed value \$100, but worth at the time of the sale three or four times that amount, and sold for a small per centage of its value.



Fairness is required on the part of the vendee as well as the vendor.

Knowing what we do of this sale, and knowing no more, I do not think we can hold it to have been fairly conducted, so as to give operation to section 155.

But that section applies only to "lands sold by the treasurer in pursuance of and under the authority of the Assessment Act of 1869 or of this Act;" and there are, I think, good reasons for holding that this land was not sold in pursuance of the Act.

Section 130 expressly forbids the treasurer selling any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of February preceding the sale, nor any of the lands which have been returned to him as being occupied under the provisions of section 111, except the lands the arrears for which had been placed on the collection roll of the preceding year, and again returned unpaid and still in arrear in consequence of insufficient distress being found on the lands.

There is no disputing the fact that this land was occupied, and that there was sufficient distress upon it in 1882, but although it had been (as it is said) included in the lists furnished by the treasurer to the clerk of the municipality in the month of February preceding the sale, it had not been returned to the treasurer as occupied.

The true explanation of the muddle is most likely the fact, which explains so much, that the taxes had been regularly paid at the proper time; but adhering to the assumption that they were not paid, on which the case was discussed before us, the fault would be that of the assessor in neglecting the duty cast on him by section 109 to ascertain that the lot was occupied.

The steps are these: the treasurer sends to the clerk a list of the lands the taxes of which are three years in arrear, (sec. 108); the clerk gives the list to the assessor, (sec. 109); the assessor ascertains if the lot is occupied, and if so, he marks it on his roll and returns it to the clerk, veri-

fied under oath, (secs. 109-110); the clerk adds the arrears to the current year's taxes on the collector's roll to be collected like other taxes, and sends a list to the treasurer of the lands returned as occupied, (sec. 111); and the treasurer is not to sell them till the collector fails to collect the taxes, (sec. 130.)

The literal reading of section 130 is that the treasurer is not to sell lands returned as occupied; but to confine the effect of the prohibition to lands so returned, and not to extend it to lands that ought to have been so returned, is in my judgment to adhere to the letter and lose sight of the spirit and true effect of the provision. These, I take to be that lands which have become occupied, and on which there is distress sufficient to satisfy the taxes, are not to be sold. The form of the enactment is the assignment to each officer of his duty in respect of the land, the effect of the whole being that occupied land is not to be sold without an effort to collect the taxes. To carry out the scheme effectively and without confusion requires due attention by each officer to his division of the service, wherefore the assessor has to swear to his returns, and penalties are affixed to the neglect of the duties by him or by the clerk; but I see no good reason for inferring from the imposition of those penalties that the duties are directory only and not essential to the liability of the land to be sold. The coercive enactments, as well as the sworn verification of the assessor's return, have a useful purpose to serve if they guard against the mistake of selling land that is not liable to be sold.

In *Deverill v. Coe*, in the Court below, and particularly in the judgment of Mr. Justice Armour, views are expressed respecting this matter which probably anticipate all that I have said, and with which I concur.

This is, therefore, one reason why the sale cannot, in my judgment, be properly held to be a sale under the Act.

Another reason is, that the sale was not for the assessed taxes. The facts on this point seem to have been brought out in the evidence, but the effect of them did not attract

my attention until it was called to the matter by my brother Burton since the argument.

The assessment was of a tract valued and assessed at \$800, and described as sub-divisions 12, 13, 14 of lot 38, and the tax for the whole tract was extended as \$3.20.

I see no authority for the apportionment of the amount among different parcels of the tract and the sale of the tract in those parcels.

Section 137 certainly does not authorize it; and section 118, which authorises the treasurer, upon proof of a parcel of land on which taxes are due having been sub-divided, to receive a proportionate part of the taxes for any of the sub-divisions, does not seem to apply to a case where no sub-division has been made since the assessment, but the original owner continues the owner of the whole parcel.

It is needless to add that the same defects which stand in the way of calling the sale a sale under the Act for the purpose of section 155, are fatal to the sale which that section does not aid. On every ground the defendant fails, and the appeal should therefore be dismissed.

OSLER, J.A.—The question involved in this case is the validity of a sale of the plaintiff's land for taxes.

It is evident that there were very serious irregularities and omissions in the proceedings required by law to be observed prior to the sale. As to these the only question is, whether they are cured by either of the validating clauses, sections 155, 156, of the Assessment Act. The plaintiff contends that they are not; but as he also urges that the taxes of 1879, for which the land was sold, were in fact duly paid to the township collector for that year, and that question lies at the root of the case, I will first examine it.

In June, 1878, this land, with that in question in *Deverill v. Coe*, and *Donovan v. Hovey*, (with which latter suit the present is consolidated) was bought by Coe from one Canavan.

In the latter part of that year, or the beginning of 1879,

Coe began to build thereon, and moved into his house about June, 1879, having become a resident of the township in the previous month.

The house was burnt in the summer of 1880, but was re-built, and in that and subsequent years to 1883, inclusive, the lands were properly assessed as occupied lands in Coe's name, and the taxes were duly paid thereon, except those for 1880, which the township council remitted in consideration of his loss.

On the 30th December, 1882, the lands were sold by the county treasurer for the taxes of 1879.

I think the evidence leaves no reasonable doubt that those taxes were in fact paid to one Rudolphus Wilson, who was the township collector for that year, and the learned Judge who tried the case of *Deverill v. Coe*, so found.

If the payment to Wilson was a valid payment, the subsequent sale of the lands cannot be supported, as there were in that case no taxes in arrear for which they could be sold, and the validating clauses of the Act would not apply: *Hamilton v. Eggleton*, 22 C. P. 536; *Kempt v. Parkyns*, 25 C. P. 536; *Beckett v. Johnston*, 32 C. P. 300, 322; *Fleming v. McNab*, 8 A. R. 656, 667; *Crysler v. McKay*, 3 S. C. R. 436.

The defendant contends that the lands were assessed as non-resident lands, and so returned to the county treasurer, and therefore that Wilson could have had no authority to demand or receive payment of the taxes. This is the first point to be considered, and the facts which bear upon it must be noticed.

William Brown, the assessor for the year 1879, knew that Coe had purchased the land. He said it was unoccupied when he assessed in January or February, and that he assessed it as non-resident land, entering it upon his roll, as required by law, separately from the other assessments under the heading "non-resident's land assessments."

The land consisted of lots 12, 13, and 14, on a plan of sub-division of part of lot 38, in the 2nd concession from



the bay, in the township of York, and as Coe was not at that time a resident of the township, and is not shewn to have given notice under section 3 of the Assessment Act, requiring his name to be entered on the roll as owner, it was, no doubt, properly assessable as land of a non-resident: secs. 3, 12, 16, 17, 27. Instead, however, of entering it in the manner prescribed by the last section, viz., with the unoccupied lots by their numbers and names *alone*, separately valued, and *without the name of the owner*, it was entered *with* the name of the owner prefixed, and valued en bloc., thus: "R. Coe, part of lot 38, in 2nd from Bay, sub-div. lots 12, 13, 14; 3<sup>24</sup>, 3<sup>51</sup>, 3<sup>51</sup>, (the latter figures denoting the acreage of the respective lots), \$800."

Other lots, with the owner's name prefixed, were similarly entered. I am not prepared to say, looking at the terms of sec. 27, sub-sec. 3, and at the powers conferred upon the county treasurer by sec. 118, to apportion the tax upon sub-divisions, that, where the whole of the land taxed belongs to the same person (*Black v. Harrington*, 12 Gr. 175) such an assessment as the above, though not strictly in accordance with the prescribed manner, would be insufficient for the purpose of preparing the non-resident tax roll mentioned in sec. 90; but it is important to notice that it was not used for that purpose, and that Coe, who had in fact become a resident of the municipality, and who was assessed *by name* upon the roll, was dealt with by the township, (to whom the taxes, whether of residents or non-residents, belonged,) in all respects as if he had been entered in the first, or resident division of the roll, instead of in the second or non-resident division.

Sections 88, 89, 90, prescribe the duties of the clerk in regard to the tax rolls to be made up from the assessment rolls.

Section 88. The clerk shall make a collector's roll or rolls as may be necessary, and shall set down therein the name in full of every person assessed, and the assessed value of his taxable property and income \* \* and shall calculate, and, opposite said assessed value as therein described of each respective person, shall set down in separate columns, the several rates with which such person is chargeable, &c.

Section 89 provides that the roll is to be delivered by the clerk to the collector on or before the 1st October, or such other day as may be prescribed by law.

Section 90. The clerk shall also make out a roll, in which he shall enter lands of non-residents, whose names have not been set down in the assessor's roll, \* \* together with the value, &c., of each lot, &c., as ascertained after final revision of the roll, and the rates and taxes with which the same is chargeable, in the same manner as is provided for the entry of rates and taxes upon the collector's roll, and shall transmit the same certified under his hand to the treasurer of the county on or before the 1st November.

Now, in this case, the township clerk instead of making out and transmitting to the county treasurer the non-resident tax roll as required by section 90, appears to have set down Coe's name, as well as the names of other persons appearing in the non-resident division of the assessment roll, in the ordinary *collector's roll* for the year, prepared under section 88, inserting also the other particulars, values, rates, &c., as in the case of a resident assessment ; and the return which should have been made to the county treasurer by the 1st November, of non-resident taxes of the township for the year 1879, was not made until after the return of the *collector's roll*, and purports to shew the non-resident taxes of that year which he had been unable to collect. It is made on a form with the printed heading, "Non-resident collector's roll for the township of York for 1879," and is described and certified by the clerk as, "list of non-resident taxes returned from the collector's roll for West York for 1879, by R. C. Wilson."

It was received by the treasurer on the 10th April, two days after the time fixed by section 113 for the return to him by the township clerk of all unpaid taxes "described in the collector's roll to be collected." It is, however, manifestly not the return mentioned in that section.

The collector's roll for 1879 was destroyed in an accidental fire in 1881, but enough appears from the other documents I have mentioned, and the evidence of the

township and county officials to shew that Coe's taxes for 1879 were placed by the township clerk upon the ordinary *collector's roll* for that year, no return of them being made to the county treasurer until the following year, and then only as of taxes which the collector had been unable to recover. These circumstances are not noticed in the judgment in *Deverill v. Coe*, 11 O. R. 222, where the payment of the taxes is treated, pp. 227, 237, as having been made to a person without any semblance of authority to receive it beyond the fact of his being the township collector. If that were so, I should agree that it was not a valid payment. The case now presents a very different aspect. The taxes having been in fact entered upon the collector's roll in the way I have described, it is impossible to say that he was not clothed with an authority on the part of the township to receive them so as to discharge the person assessed. Conceding that the action of the assessor in placing the name on the roll was irregular or even illegal, yet it was so merely because Coe had not required it to be placed there, and to be personally assessed. He might probably at the risk of a law suit have refused payment, and insisted that the taxes were a charge upon the land only, but I think he was at liberty to acquiesce in what had been done, and to treat the assessment as the township had treated it, as a personal or resident assessment.

In *Municipality of Berlin v. Grange*, 5 C. P. 211 ; 1 E. & A. 279, it was held, that a non-resident whose name had, without his request, been placed upon the assessment roll, could not be sued for the taxes by the township, but the judgment is quite consistent with his being at liberty to waive the objection, and to pay them if he pleased.

On the ground, therefore, that there were no taxes in arrear, I think that the sale was invalid, and that the judgment should be affirmed.

The other objections to the sale, assuming that the taxes were still a legal charge upon the land, have, I think, been properly dealt with in the Court below, and in the judgments which have just been delivered.

One cannot avoid a certain feeling of alarm and indignation at the facility with which, as it is said, a person against whom there is no imputation of negligence, can be deprived of his property in consequence of the criminal neglect and malfeasance of the township officials; and one no doubt has to guard against being led to place a strained construction upon the Act in endeavouring to avoid injustice.

But I am of opinion upon full consideration, that two essential requirements of the Act were neglected; one by the assessor, the other by the clerk, after the county treasurer had furnished the latter with the list mentioned in section 109. The transmission of the list as a preparatory step to obtaining payment of the taxes for the local municipality by a sale of the land, would be a useless formality unless the officers of the municipality comply with the requirements of sections 109-111.

If the object to be attained is regarded, their duties are quite as little matters of procedure as the initial act of the treasurer in transmitting the list. Without quoting I may refer for the principle which should govern the construction of this group of sections to *Nicholls v. Cummings*, 1 S. C. R. 395; *McKay v. Chrysler*, 3 S. C. R., at pp. 474, 484-5. Here the assessor omitted to give notice to Coe that his land was liable to be sold for arrears of taxes—sections 109, 110—and the clerk omitted to examine the assessment roll of 1882 (where he would have found this land assessed as occupied land), and to include it in the list of occupied lands returned by him to the treasurer under section 111.

The importance attached to this return is shewn by the fact that the clerk's duty is to make an independent examination of the roll, and is not to rely merely upon the assessor's return to him of the treasurer's list. Sections 114, 129 and 130 point to the conclusion that in the case of non-resident land which has become occupied, at least one attempt is to be made to recover the taxes by distress before proceeding to sell it.



Until the two provisions I have referred to were complied with, I am unable to see that the land had by law become liable to be sold.

The validating clauses of the Act, therefore, will not aid the defendant. As to the objection that more than two years had elapsed between the sale and the bringing of this action, I agree for the reasons given in *Hutchinson v. Collyer*, 27 C. P. 249, and *Church v. Fenton*, 28 C. P. 404, notwithstanding the observations upon these cases in *Smith v. Midland*, 4 O. R. 498; *Little v. Broddy*, 10 O. R. 530; *Claxton v. Shibley*, 10 O. R. 295, and *Deverill v. Coe*, 11 O. R. 222, that the period mentioned in section 156, runs from the giving of the tax deed and not from the date of sale.

For these reasons I concur in dismissing the appeal.

*Appeal dismissed with costs.*

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## HALL V. FARQUHARSON.

*Assessment and taxes—Tax sale—Sale honestly and fairly conducted—Sale for more than was due—R. S. O. 1887, ch. 180, secs. 137, 155—Double assessment—Identity of parcel sold with that taxed—Payment of taxes—Statute labour.*

Plaintiff was the owner of a group of small islands in Lake Rousseau in the township of Medora, containing in all less than fifty acres. The island in question was patented to one Pope by the description of Island D. Plaintiff purchased it from Pope and called it by the fancy name of Oak Island, and built a house and made other improvements thereon, residing there for some months in each year.

The assessor having been erroneously informed that Pope was the owner of an island in Lake Rousseau called D, put down Island D in the non-resident division of the assessment roll with the name "Robert T. Pope." This was done to distinguish it from another Island D in the same lake and township. He did not know that this Island D was one of the group belonging to Hall, though he knew that Hall was putting improvements on one of the islands which was in fact Island D or Oak Island. He supposed that the name of the improved island was Flora; and this was the name of one of Hall's Islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed, and actually assessed though under a wrong name. The taxes so assessed were actually paid. In 1883 the Island D was sold for arrears of taxes for the years 1879, 1880, 1881 and 1882. The purchase money was \$1, although the value with the improvements was about \$1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll.

*Held*, (affirming the judgment of the Chancery Division) that Island D being identified as that intended to be assessed, and being that on which the improvements had been made the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid the sale was void.

*Seemle, per* HAGARTY, C. J. O., PATTERSON, and OSLER, JJ.A., that the sale would also be void as not having been under the circumstances openly and fairly conducted within the meaning of section 155.

The duty of the county treasurer in reference to tax sales observed upon: *Hall v. Hall*, 2 E. & A. 569; *Haisley v. Somers*, 13 O. R. 605, considered. *Seemle*, a sale for more taxes than are actually due cannot be supported under sec. 137, where sec. 155 does not apply in consequence of the sale not having been openly and fairly conducted,

*Yokham v. Hall*, 13 Gr. 235; *Edinburgh Life Ins. Co. v. Ferguson*, 32 U. C. R. 253, followed.

*Seemle*, that Island D or Oak Island should have been assessed on the resident instead of the non-resident division of the assessment roll.

*Per* PATTERSON, J. A.—Observations as to assessment of several parcels of non-resident land less than 200 acres for statute labor.

THIS was an appeal by the defendant from the judgment of the Chancery Division, reported 13 O. R. 598, where and in the present judgments the facts and points raised are stated.

The appeal came on to be heard before this Court, on the 11th and 14th of November, 1887.\*

*McCarthy*, Q. C., and *Pepler*, for the appellant.

*McMichael*, Q. C., for the respondent.

April 3, 1888. HAGARTY, C. J. O.—The defendant has to establish that there was a valid sale of island D., irrespective of the other points raised by plaintiff.

This island was patented to Pope, 1st September, 1876, for the price of \$10, described as "Island D in Lake Rosseau, in the township of Medora,"  $1\frac{2}{10}$ ths of an acre, lying twelve chains fifty links north-westerly from Island C., previously granted to Doctor Adams, and as shewn on a plan made by the grantee, Pope, a Provincial Land Surveyor, August, 1875.

A few days afterwards, Sept. 16, 1876, Pope conveyed the island to plaintiff Hall, with same description—consideration of \$25; and on 18th September, 1877, Hall obtained the patent for Cedar and Flora Islands.

As far as I can understand there are three Islands D, in Lake Rosseau, but only two Islands D in Medora township.

In the *Ontario Gazette* for 1883, the treasurer's advertisement of sale reciting the warrant, appears,

" Township of Medora,

Lake Rosseau — Islands C, D, G, H, and Island D, (Pope)  $1\frac{2}{10}$ ths acre; amount due \$10.42, costs and fees \$3.10."

The warden's deed to defendant is dated 15th January, 1885, reciting the sale 14th December, 1883, and conveys to defendant, in consideration of \$1, Island D, (or Pope Island) in Lake Rosseau, in the township of Medora,  $1\frac{2}{10}$ ths acre.

On the non-resident roll for 1879, for the first time the property appears assessed. After the description of the

\* *Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

lot appears the name of Robert T. Pope, Island D, four acres; John Hall, Cedar Island, four acres, Flora Island, 25 acres.

In 1880, Robert T. Pope, Island D; same in 1881 and 1882.

In 1880 and 1881, Hall appears on the resident roll, for Cedar and Flora Islands; and in 1883, for Oak, Cedar, Flora, and Beacon Islands. Flora Island being marked H, meaning house, signifying improvements.

In 1882, this Pope Island was assessed by mistake, as Island L instead of D. Four years arrears seem to have been claimed, 1879 to 1883.

The treasurer states that it was called Pope Island, because the name appeared, and there was another Island D, in the same lake to distinguish it. As a rule no names are put in the treasurer's books; on non-resident lands this was done, because it was so returned by the township.

He states that in the roll of 1879, no lake was mentioned, and the treasurer sent back the roll to have the name of the lake inserted. The answer was, that the assessor did not know the name of the lake, and could not find it out. For all the treasurer knew it might be Lake Joseph on which also Medora fronted. The annual tax on the island was about \$2.04. each of the four years. The cents are the taxes: the \$2 statute labour.

The treasurer corrected the error of L for D; the duplicate roll was correct.

Orchard was the assessor for all these years, and gave evidence at the trial.

Hall began putting improvements on one of the four islands in 1879, and the assessor knew this. Hall called this island Oak Island. It never was called or known as Pope Island or Island D after he got it. In 1879, he assessed Flora Island at \$25; Cedar at \$4, as he says, in consequence of the small improvement; he thinking that Flora was the correct name.

Orchard entered Pope as non-resident on the roll for



Island D, as the assessor did not know where this island was. He put down \$4 as the assessment. He had heard that Pope was the owner. He did not know that the island was one of those Hall had.

It seems clear that the island in question was never popularly known either as Island D or Pope Island.

Mr. Pope was the surveyor employed by the Government, and on his survey in 1876, and again in 1877, that the island was sold to him as Island D, and that the two small islands never were patented to Hall as Cedar and Flora Islands, the names Hall gave them. He cannot say when he first called the improved island Oak Island. He says he thinks it was a year or two after he bought. It first appears as Oak Island in 1882 in the resident roll. He paid taxes just as he was asked for them.

The evidence is distinct beyond question, that this improved island on which there were improvements in 1879, the first year of assessment, was meant to be assessed, and was actually assessed, although under a wrong name, and the assessment calculated and levied and paid on the improved value, whether in fact its proper name was Flora, Oak, or Island D. Of this, there can be no doubt, and the municipality of Medora got the benefit of this assessment on Hall's improvements every year.

In reality Flora Island was a rock described in the patent as 1-10th of an acre.

So that the question before us is, in substance, can land be legally sold for taxes, on which, as a matter of fact, the taxes have been regularly paid for the full period claimed? It becomes a mere question of description and identity. The assessor finds that there is an Island called D somewhere in the lake, part of which is included in the bounds of his township. He knows nothing whatever as to its locality, and never saw it so as to know it as Island D. He hears somewhere that it belonged to a man named Pope, and so it goes down on his non-resident list as Island D or Pope Island, and it so remains for 1879, 1880, 1881,

and 1882, as Island D, and the name of Robert T. Pope as the "occupant or other taxable party."

He makes no attempt to look for this Island D or Pope Island, whether it is occupied or not.

But as far as Hall, the plaintiff, is concerned, and who is the true owner of this island, which he has called by another name, the assessor aware of his ownership of a group of islands, notices improvements on one of them—really the island in question, but which he thinks has another name, and he assesses it with the large improvements put on it by Hall, who comes to reside thereon every summer, and receives year by year from Hall the full amount of the assessment, and so the land has always, in fact, paid its taxes, and when ordered to be sold and was sold it owed nothing whatever.

I cannot accede to the argument that, because Island D or Pope Island always remained on the roll and taxes were placed against it for the four years—nobody apparently knowing where it was—and no inquiry being made about it under that name, that, therefore, the sale must be held regular, and the true owner who has always, under another local name, duly paid the taxes, can thus lose his estate.

The Crown grants to A a close named Blackacre. A enters into possession and calls it Whiteacre, improves it, and from year to year pays all taxes assessed against it as Whiteacre. Blackacre all the time remains on the roll—no person knowing where it is, and taxes are regularly entered against it. They have been in fact all paid for the same close in another name. Confusion is, of course, created by the assessor, confounding the new names, and calling the little rock Flora, as that on which the improvements were made, and on which the taxes were claimed and duly paid.

But the principle seems to me unaffected by this last named mistake.

If the sale be upheld, the whole assessment for the four years will have been twice paid to the municipality.

Now, what has caused all this difficulty and who is to suffer? The officers of the municipalities and the township and county have caused it. The township officials have for years assessed an island of which they know nothing and inquire nothing. They treat it as an uninhabited island, when in truth it has \$2,000 worth of improvements on it. A very trifling amount of inquiry could have made all right. The actual owner and occupant is asked for, and duly pays, the assessment on the improved value. I cannot bring myself to think that he must thus lose his estate. I further think that if the municipality brought an action against Hall for the taxes on Island D, he could have proved payment, and defeated the claim.

The sale was on 14th December, 1883; the deed, 15th January, 1885. This suit was commenced 22nd September, 1885, and is therefore brought in good time.

I fully concur in the remarks of Sir A. Wilson in *Deverill v. Coe*, 11 O. R. at p. 239, and share his doubts as to whether the sale of a property at a monstrous and startling undervalue can be said to be a sale honestly and fairly conducted. He so spoke in reference to a tax sale for \$4.04 of land worth \$300 or \$400. We have before us a sale of property worth at least \$2,000 for \$1.

I cannot believe that such a proceeding can be sanctioned. Are we to assume that the Legislature was so utterly indifferent to the rights of owners as to permit a proceeding like this to be upheld as a sale openly and fairly conducted?

I cannot agree that there is no duty whatever imposed on the officials in such a case. I think something ought to have been known of the subject matter of the sale, especially when information was so easily available.

See the remarks of Proudfoot, J., in *Haisley v. Somers*, 13 O. R. 605, as to the treasurer's duty "to make himself acquainted with the property he is selling," citing the language used by VanKoughnet, C., in *Hall v. Hall*, 2 E. & A. 569.

Only two properties were advertised for sale in Medora and in these properties were two islands called D in Lake Rosseau.

Mr. Pope, whose name they attached to this Island D, had apparently surveyed for the Government the islands of Lake Rosseau, and was probably a well known person.

The vendors here may be assumed to know nothing of the property which they in fact sell for the two thousandth part of its proved value.

The evidence before us shews such a course of dealing with the assessments for the four years as to call—if ever a case could call—for a little, at the least, of care and inquiry in the conduct of a tax sale.

In the Court below, the trial Judge and the Divisional Court have suggested many other reasons for impeaching this sale.

I agree in holding that it cannot be supported. I base my judgment on the fact which I find proved, that the taxes were all, in fact, paid.

BURTON, J. A.—The facts disclosed in this case seem to call loudly for legislative interference. There is something so shocking to one's sense of justice that a person who has made valuable improvements upon property, and who has for many years lived for some portion of each year upon it, and made reasonable exertions to ascertain the taxes assessed against it, should find that it has been sold—if it can be called a sale—for the nominal price of a dollar, without any notice, that one feels that such transactions should not be permitted under the forms of law ; but that very circumstance ought to make us more careful that our indignation at such a proceeding does not induce us to do a further injustice by declaring void what may be strictly warranted by the terms of the Act of Parliament under which the defendant has acquired his title.

No assessments are made upon any lands until a return is received from the Commissioner of Crown Lands by the treasurer of the county of all the land within the county located as free grants sold or agreed to be sold by the Crown, or leased, or in respect of which a license of occupation has been issued during the preceding year.



It becomes then the duty of the county treasurer to furnish the clerk of each local municipality with a copy of the list so far as regards lands in such municipality, and the clerk is then to furnish the assessors with a statement shewing what lands are liable to be assessed.

The patent issued for the lot letter D to Pope in the month of September, 1876, and the plaintiff purchased from him in the same month.

In the following month of February, therefore, we may assume that it was returned to the county treasurer, and it should have been assessed in 1877.

It does not appear, however, to have been assessed until 1879, when it first appears on the non-resident roll, and the name of Pope appears in the roll, not, as has been assumed, in the column headed owner or occupant, but after the description of the lot, as the treasurer explains, to distinguish it from another lot lettered D in the same lake and township, as that was the name of the patentee from the Crown.

It is clear that the assessor took no particular pains to inform himself about the location of this lot, or whether it was or was not occupied; he did not even know that it was owned by Dr. Hall at all, and it was no part of his duty to ascertain that fact; it was Dr. Hall's privilege to have it placed on the resident roll if he thought proper, and it was his duty to make the request if he desired it. The lot being placed on the assessor's roll, it became the latter's duty merely to ascertain its assessable value and so to return it.

But before the assessment of 1879, Dr. Hall had obtained patents for two islands, called Cedar and Flora Islands, and these had been duly returned to the county treasurer and a memorandum furnished to the assessor, and the name of Hall unnecessarily appeared on the roll, and is material only in this view, that it confirms the evidence that the assessor had no knowledge that Dr. Hall had any interest in letter D whilst he had in the two other islands, and this led, not unnaturally, to the mistake which has led to all the trouble in this case.

It is clear that in making the assessment for that year the assessor did assess Flora Island as the island on which Dr. Hall had made his improvements, and that those taxes have been paid.

The duties of the assessor appear to have been performed in a very perfunctory manner; but Dr. Hall cannot be acquitted of great want of care. He was well aware that previously to 1882 he had only paid taxes on three islands although he owned four, and in 1880 and 1881 he was not only aware that he was paying no taxes on letter D, but that the assessor was under a misapprehension which he might easily have corrected in assessing the improvements as being either on Flora or Beacon Island.

With this knowledge that no taxes were being paid upon one of his lots, he writes to the treasurer in 1880 to ascertain the amount of his taxes, and he then appears to have contemplated applying to have the lots placed on the resident roll; but this was done in so unbusinesslike a way that it is not surprising that he failed to obtain the information sought.

The treasurer could, of course, have no knowledge of what islands he owned, and instead of mentioning to him the description of his islands as described in the patent, he merely asks for the amount of taxes due on the small rocky islands owned by him in Lake Rosseau, less than four acres in all.

Under these circumstances, a very serious question presents itself as to who is to bear the loss, and I wish to consider it as we should have considered it if a large price had been paid by the purchaser, instead of the nominal consideration for which the land was sold.

Counsel for the defendant contend that the assessment on letter D having been duly made according to law, the roll is conclusive, not having been appealed against, and those taxes never have been paid.

But I think the proper way to look at the matter is this, granting the assessment of letter D to be valid and correct, is it not also clear that the same island, although erroneously

described as Flora Island, but identified as being that on which the improvements were made, was also assessed, so that there was a double assessment and those taxes have been paid?

If this be the true view of the case, the taxes of 1879 were paid and the sale is invalid.

It is unnecessary, in this view of the matter, to consider the other questions which were argued; but, for the reasons given, I think we should dismiss the appeal.

PATTERSON, J. A.—I think the fate of this appeal would be merited if it were to be dismissed on the ground that the defendant has not, by his pleadings, controverted the plaintiff's claim.

The defence begins by denying the whole of the allegations contained in the statement of claim. This is a style of pleading that of late seems to be not unusual. Besides being unscientific, it is open to the charge of disregarding the directions of Rule 240 that each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true, and it may and ought to throw on the party adopting it the costs of issues that ought never to have been raised.

In the present instance, it denies that the defendant bought the land to which he asserts title, and in fact denies that the land was sold at all.

The only other allegation of the defence is, that the defendant "asserts title in himself to the land in question by virtue of the tax sale and deed mentioned in the said statement of claim"—that is, the sale and deed whose existence is denied.

But the sale mentioned in the statement of claim is an illegal and invalid sale, insufficient to confer any title; and the statement, which is not itself a model of careful pleading, does not allege that the defendant was the purchaser, or that a deed was made to any one; although, taking all that for granted, it asks that the deed made in pursuance of the sale may be delivered up to be cancelled.

We may, nevertheless, see whether the defendant has a better case upon the facts than he has made upon his pleading.

He must, as I apprehend, rely solely on being able to maintain that under the strict effect of the Assessment Act the land became liable to be sold and was regularly sold for taxes.

The curative sections, 155 and 156, of the Act, R. S. O. 1877, ch. 180, cannot be appealed to to help him, nor do I understand him to insist on them. He certainly has not pleaded them.

The indispensable pre-requisite to the application of section 155 is, that the sale shall have been openly and fairly conducted. The history of this sale is not revealed to us, and neither the defendant himself nor any one acquainted with the circumstances appeared as a witness at the trial.

Section 156 is out of the question by reason of the action having been commenced too soon for the section to operate, whether the two years' limitation is counted from the sale or from the making of the deed.

The understanding of the township and county officials seems to be that Island D was assessed as non-resident land in 1879, 1880, 1881, and 1882, and the action has been conducted and contested on the assumption that that was the case.

The fact is, that in each of those years the name of Robert T. Pope was entered on the roll as the owner of the island.

Looking at the Assessment Act, we find it laid down in section 3 that "Unoccupied land shall be denominated 'lands of non-residents,' unless the owner thereof has a legal domicile or place of business in the local municipality where the same is situate, or gives notice in writing \* \* that he owns such land, describing it, and requires his name to be entered on the assessment roll therefor." Section 12 requires the assessor to enter the names and surnames in full of all non-resident owners who have given the notice in writing mentioned in sec. 3, and required



their names to be entered on the roll. Sec. 14 enacts that land occupied by the owner shall be assessed in his name; and sec. 16, that if the owner of the land is not resident within the municipality, but resident within this Province, it shall be assessed in the name of and against the occupant and owner; but if the land is not occupied, and the owner has not requested to be assessed therefor, then it shall be assessed as land of a non-resident.

From these provisions it is clear that, if the roll on which Island D appeared by that name was the non-resident roll, no person should have been named as owner.

The form of the assessment suggests the question whether we ought not to look upon it as an assessment of resident and not of non-resident land; but, as that question has not been mooted, I propose to discuss the case on the assumption that the roll was the non-resident roll, treating the names upon it, viz., the name of Pope in the four years and the name of the plaintiff in 1879, when his name appeared against Cedar and Flora Islands, as informal memoranda and as not to be regarded as statutory entries, though it will not be possible to conduct the discussion without an occasional allusion to the fact that the names are there.

The island which, with the buildings and improvements upon it, is said to be worth more than \$2,000, was sold for taxes for the years 1879, 1880, 1881, and 1882. The amount paid for it by the purchaser is said to have been one dollar. The taxes for the four years are put down as \$8.18; but of that amount only the eighteen cents constitute the assessment proper, the eight dollars being for statute labour for the four years at two dollars a year.

I do not read the Assessment Act as justifying that charge for statute labour.

Let us examine this point before considering whether in reality the plaintiff had not paid all the taxes properly payable in respect of the land in dispute.

The taxes and statute labour for which the sale purported to be made were charged on the non-resident roll

against Island D. The name of Robert T. Pope was noted on that roll as owner, but Pope was not the owner, *if* the Island D there assessed was the land now in dispute. If not identical with the land in dispute, *cadit quæstio*. If it was the same land, then the plaintiff was the owner.

The provisions which seem to apply are secs. 80, 82, 83, 86, and 87.

Sec. 86 enacts that no non-resident who has not required his name to be entered on the roll shall be permitted to perform statute labour in respect of any land owned by him, but a commutation tax shall be charged against every separate lot or parcel *according to its assessed value*; and the first part of sec. 87 has a corresponding declaration that "in all cases, both of residents and non-residents, the statute labour shall be rated and charged against every separate lot or parcel *according to its assessed value*."

We have to ascertain from the statute what is meant by charging the lot according to its assessed value. Sec. 82 empowers the council to fix the rate at which parties may commute their statute labour at any rate not exceeding one dollar a day, and declares that the sum so fixed shall apply equally to residents who are subject to statute labour and to non-residents in respect to their property; and sec. 83 fixes one dollar a day as the commutation rate in respect of lands of non-residents when no by-law has been passed by the council.

The scale, according to the assessed value, is given in section 80. It may be material to note the precise language used: "80. *Every person assessed* upon the assessment roll of a township shall, if his property is assessed at not more than \$400 be liable to two days statute labour," and so on for larger amounts.

Now who was the person assessed for Island D? The error of the assessor in writing the name of Pope on the non-resident roll did not make it an assessment of Pope. It was not his property and he could not have been made liable to pay the commutation money. Either the plaintiff, who was the owner, was the person assessed or there was

no one assessed, In the latter case, there is nothing to which the direction of sec. 87, that the land is to be charged according to its assessed value, can be referred, and the direction will not touch Island D. But if the plaintiff is to be treated as the person assessed, through the assessment of his property, then the second part of sec. 87 has to be read.

It enacts that " whenever one person is assessed for lots or parts of lots in one municipality, not exceeding in the aggregate 200 acres, the said part or parts shall be rated and charged for statute labour as if the same were one lot," &c. That is the present case. The plaintiff was assessed for several parcels, in the aggregate, including Island D, being much less than 200 acres, in 1880, 1881, and 1882 on the resident roll and in 1879 on the non-resident roll. He was liable, therefore, to only one sum of \$2.00 in each year in respect of all his properties; and to charge Island D with \$2.00 a year was not to act on the statutory mode prescribed for charging the statute labour according to the assessed value.

The township officials were fully aware of this, and charged only one sum of \$2.00 in respect of all the properties which, in any one year, they put against the plaintiff's name, whether on the resident or on the non-resident roll. The error was the original one of the assessor in noting Pope's name.

A non-resident is not to be charged on a higher scale for statute labour than a resident. The quotations I have made from the statute carefully place them on the same footing. If the whole group of islands had been entered as non-resident, and correctly entered without the name of any one affixed to them, I take it that the owner could not have been charged more than \$2.00 for the group. There might be room to contend, as I have hinted, that he was not liable at all, by reason of the rule given in sec. 80 for adjusting the statute labour according to the assessed value not quite fitting the case; but the sum of \$2.00 could not, by any reading of that section in conjunction with sec. 87, be exceeded.

The objection on the ground that the original charge for statute labor was excessive, is not the only or the most formidable one in connection with these charges.

The plaintiff was in fact rated personally every year for \$2 for statute labor, and paid it, thereby paying all he was properly chargeable for in respect of the whole group of islands.

Nothing can have remained due when the land was put up for sale beyond, at the outside, eighteen cents, viz., five cents for each of the years 1879 and 1880, and four cents for each of the years 1881 and 1882.

Whether or not those amounts were due is a separate matter to be considered by itself. It will appear that the plaintiff was indisputably assessed in 1882 for the island, and paid the taxes; wherefore, as regards the taxes for that year, whatever may be the result of the argument as to the other years, as well as with regard to the statute labour, the sale was for too much.

This selling for more than was due, if supportable at all, could only be so by aid of sec. 155 or 156. Those sections being out of the question, the doctrine which was acted on by VanKoughnet, C., in *Yokham v. Hall*, 15 Gr. 235, and followed in *Edinburgh Life Co. v. Ferguson*, 32 U. C. R. 253, and other cases, is fatal to the defence.

It has sometimes been urged in argument, though, I think, never assented to by any of the Courts, that that doctrine is now at variance with sec. 137 of R. S. O. 1877, ch. 180, which (as sec. 138 of 32 Vict. ch. 36) became law a few months after *Yokham v. Hall* was decided, and which concludes with the words: "And the amount of taxes stated in the treasurer's advertisement shall in all cases be held to be the correct amount due." The argument has plausibility only when the words are separated from their context. The section relates to the duty of the treasurer in conducting a sale of land for taxes. He is to "sell by public auction so much of the land as is sufficient to discharge the taxes and all lawful charges incurred in and about the sale and the collection of the taxes, selling in



preference such part as he may consider best for the owner to sell first ; and in offering or selling such lands, it shall not be necessary to describe particularly the portion of the lot which is to be sold, but it shall be sufficient to say that he will sell so much of the lot as may be necessary to secure the payment of the taxes due ; and the amount of taxes stated in the treasurer's advertisement shall in all cases be held to be the correct amount due."

This does not, in my judgment, affect the question of the liability of the land to be sold, but only the mode of conducting the sale. A sale may, by virtue of sec. 155, be unimpeachable and yet the municipality be liable to account for part of the purchase money to the owner of the land sold ; as *e. g.*, where part of the taxes mentioned in the advertisement had been paid, though some of the amount remained due ; while sec. 137 would protect the treasurer from liability for selling more land than enough, and would also make the purchaser secure.

But when sec. 155 does not apply, the reading of sec. 137 that would save a sale for more taxes than were really in arrear, would have equal force if there were no taxes in arrear or none in arrear for those years. This would certainly not be in accord with opinions which have prevailed since the Act of 1869, as well as before it. See *Hamilton v. Eggleston*, 22 C. P. 536 ; *McKay v. Cryslar*, per Gwynne, J., 3 S. C. R. 436, 472 ; *Charlton v. Watson*, 4 O. R. 489.

The features of the case on which I have so far touched are not those principally, if indeed they were to any extent, given prominence to in the Courts below ; but I must not, on that account, be understood to differ from the views there expressed and acted on.

I agree with Mr. Justice Ferguson, who tried the action, that the plaintiff was really assessed for the land in question, and there is no doubt that he paid all the taxes for which he was assessed.

We have the distinct evidence of the assessor, fully borne out by the assessment rolls, that he intended to assess the plaintiff, and understood that he was assessing

him in fact, for the island that had the buildings on it ; but he was given the information by some one that Robert T. Pope owned an island called D, and he accordingly put down Island D on the non-resident roll with the name "Robert T. Pope." The information was incorrect. Pope did not own Island D, but that was the island on which the plaintiff's buildings were, and which was already, in intention at least, assessed as belonging to the plaintiff.

The plaintiff owned other islands to which he had given the names of Cedar Island and Flora Island, which names had been, at his instance, used to designate those islands in the patent from the Crown, in which Cedar Island was described as containing four-tenths of an acre and Flora Island as one-tenth of an acre, as surveyed.

He had bought Island D from Pope, who was the patentee, the area being given in the patent as one acre and two-tenths of an acre. The plaintiff, after his purchase, called the island Oak Island and built upon it. That was in 1879.

At a later date he acquired Beacon Island, containing about fifteen acres.

It is necessary to understand the mode adopted in assessing these islands.

Looking at the rolls, or the extracts furnished to us, it would seem as if the usual practice was to value the land at a dollar an acre, because we generally find the same figure in the area column and in the valuation column. The fact is, however, that the areas are, in every instance, except as to Beacon Island, put several times larger than the real contents of the island. It thus appears that the assessor did not trouble himself to ascertain even the approximate areas, but having made an estimate of the assessable value of the island, he used the figure thus arrived at for both columns.

Thus Island D, the area of which was one acre and two-tenths, is called four acres and valued at four dollars in each of the years 1879, 1880, 1881, and 1882.

In 1879, Cedar Island and Flora Island are entered

against the name of the plaintiff. The value of the two is extended as \$29, and in the area column that figure is divided into four and twenty-five, as if Cedar Island, which was only four-tenths of an acre according to the Government survey, contained four acres, and Flora Island twenty-five acres in place of the one-tenth of an acre described in the patent.

The explanation is that the assessor supposed the island that had the houses on it was Flora Island. It really was D or Oak Island, and its actual area was less than an acre and a half.

In 1880 the entry is not quite the same. Cedar and Flora Islands are assessed. In the area column there is the figure nine, which includes both islands. The column for "valuation of each parcel of real property," which in the other years is left blank, has this time four and five, being seemingly the constituents of nine, and under them "H. 30," which is explained to mean \$30 for the house. Then the total value is extended as \$39.

In 1881, the nine as area and the thirty-nine as total value are repeated without the analysis; and in 1882 the assessment is for Oak, Cedar, Flora, and Beacon Islands and a portion of the mainland on lot 24 in the 7th concession. The acreage marked against the group of islands is fifteen and a half, with thirty-nine against lot 24, and the valuation is extended as seventy-eight. Whatever portion of this represents the value of Island D, there is no doubt of that island being in this year assessed to the plaintiff as Oak Island, as well as being put opposite Pope's name as Island D on the non-resident roll.

The defendant's contention is, and must be, that a certain island being described in the patent as Island D, and an Island D being assessed for the four years in question, the land is liable to be sold for the taxes on that assessment, even though the owner has paid and the municipality has received all the money for which the land was properly taxable. In other words, it is, in effect, insisted that the assessor's error in mistaking the name of the island makes

it obligatory to refer the assessment to the little island called Flora, which is a piece of rock not much larger than this court room, notwithstanding that the roll itself proves that Island D, which had the buildings upon it, was the one really intended.

I do not think this contention can be maintained upon anything to be found in the Assessment Act.

On the contrary I find in sec. 27 the direction that "as regards the lands of non-residents who have not required their names to be entered in the roll the assessors shall proceed as follows: \* \* 2. If the land is not known to be sub-divided into lots, it shall be designated by its boundaries, or other intelligible description;" and then sub-sec. 3, which relates to sub-divisions, concludes thus: "If such quantity is a full lot, it shall be sufficiently designated as such by its name and number, but if it is a part of a lot, the part shall be designated in some other way whereby it may be known."

"Island D" was, no doubt, a sufficient description of the land granted by that name; but any other distinctive description would equally satisfy the requirements of the Act. "Oak Island," for example, which was a fancy name, would serve, as it did in 1882 and subsequent years; and the island would be sufficiently described as "John Hall's island with the houses on it." That would be really more descriptive than the fancy name which, until explained, would convey no information.

For these reasons I think Mr. Justice Ferguson's opinion that all taxes on the island were paid by the plaintiff is correct.

It may be proper to notice another objection to the sale which was the subject of some discussion.

Under sec. 109, the assessor, who is furnished with a list of lands on which taxes are three years in arrear, is to ascertain if any of the lands in the list are occupied, or are incorrectly described, and to notify the occupants, and also the owners, if known, whether resident within the municipality or not, upon their respective assessment notices that the land is liable to be sold for arrears of taxes; then under secs. 110 and 111 proceedings are taken, the result



of which is that the arrears of taxes on these lands appear on the collector's roll for the year to be collected like other taxes, and then, if not collected, the lands (under sec. 114) get on the list of lands for sale.

The importance attached to this part of the duties of the local officials is marked by provisions subjecting them to penalties for neglect of them. I am inclined to think that the plaintiff's island D, or Oak Island, was occupied as that term was interpreted in this Court in *Bank of Toronto v. Fanning*, 18 Gr. 391, notwithstanding that he lived upon it only a couple of months every summer; and that in fact it ought to have been on the resident roll for 1879 and all the other years; but that the plaintiff was certainly entitled to the notice under sec. 109 in respect of the assessment of the island as Island D.

He would, in all probability, have received the notice if the assessor had, in obedience to the statute, made proper inquiries, for he would have learned that Island D was the occupied island which he had been assessing under the the name of Flora Island.

The assessor did actually give the notice, by post card, on the 5th of May, 1882, that Cedar Island and Flora Island were liable to be sold, and the plaintiff promptly remitted the money, thereby, as already explained, paying all the taxes properly payable in respect of Island D.

It is, therefore, unnecessary to pursue the subject of sec. 109.

If the case turned upon it, I think, for the reasons very forcibly given by Sir Adam Wilson in *Deverill v. Coe*, it would be difficult to support a sale where the assessor's duty under that section had been neglected.

I agree that we should dismiss the appeal.

OSLER, J. A.—I agree in affirming the judgment of the Court below for the reasons stated therein and also for those mentioned in the judgment of Mr. Justice Patterson, which I have had an opportunity of reading.

*Appeal dismissed with costs.*

## JENNINGS V. THE GRAND TRUNK RAILWAY COMPANY.

*Negligence—Compensation for death caused by accident—R. S. O. (1887), ch. 135—Measure of damages—Life policy—Setting off insurance against damages—Administration—R. S. O. (1877), ch. 46—R. S. O. (1887), ch. 50—Express messenger—Common employment.*

Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect, or default of another is, under the R. S. O. (1887), ch. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death, is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on viewing the whole question of pecuniary loss or gain in consequence of the death.

The deceased was a resident of Buffalo, N. Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in the province; the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York.

*Held*, the grant of letters by the Surrogate Court of York was valid and effectual, and,

*Seemle*, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked. [R. S. O. (1877), ch. 46.]

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company.

*Held*, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death.

*Held*, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company.

THIS was an appeal by the defendants, from the judgment of the Queen's Bench Division, in an action brought by the plaintiff under R. S. O. ch. 128 (a) as the widow and administratrix of W. B. Jennings, to recover compensation for the loss of her husband who was killed by an accident which occurred to a train under the management of the defendants on the 10th August, 1885. The case was tried before Wilson, C. J., and a jury at St. Catharines, and the plaintiff obtained a verdict for \$6,000, which the Divisional Court subsequently refused to set aside.

The statement of claim alleged that the plaintiff's husband was a passenger by regular express train on that

part of the defendants' line known as the Great Western Division between Niagara Falls and Windsor, and that at a swing bridge, by means whereof the railway crossed the Welland Canal at or near Merritton station on their line, the train, through the negligence, &c., of the defendants, ran violently upon said bridge, while the same was open to allow of the passage of a vessel upon said canal, and before the same could be closed, by means whereof the train was thrown from the rails and wrecked, and the said Jennings so severely scalded and injured that he died, &c.

The defendants pleaded not guilty by statute, and at the trial, besides a denial of the alleged negligence, took the following objections to the claim.

1st. That as the deceased had no personal property in the province, letters of administration had been improperly granted, and the plaintiff had therefore no status as administratrix, and no right to sue.

2nd. That the deceased was being carried as a messenger of the American Express Company, under an agreement with the railway company which exempted the latter from liability for any injury which any officer, messenger, or servant of the former might sustain upon the railway by means of the default or negligence of the railway company.

3rd. That the deceased was, in effect, a servant of the railway company engaged, with other servants of the company, by whose negligence the accident was caused, in a common employment, running a train carrying passengers and express freight, the duty of taking up the latter being that of the deceased.

The facts proved, apart from those relied upon to establish the alleged negligence were, that the plaintiff's husband was at the time of the accident which caused his death a messenger in the employment of the American Express Company, and was then, with the assent of the defendants, lawfully upon the train, on behalf of that company, in charge of the parcels and other express matter which the railway company was carrying for them. His residence and fixed place of abode was at Buffalo, and he had at the

time of his death no property in Ontario. His death took place at St. Catharines in the county of Lincoln, and letters of administration were granted to the plaintiff by the Surrogate Court of the county of York. He had a policy of insurance upon his life for \$2,000, payable to his wife in case of his death, the amount of which she had received from the insurance company.

The defendants proved an agreement, dated the 1st January, 1874, between the Great Western Railway Company and the American Express Company, by which that railway company agreed to furnish the express company with certain facilities for the conduct of their business on through passenger trains between the Suspension Bridge (Niagara) and Detroit, in consideration of certain charges to be paid therefor, to the former. Clause 3 of the agreement provided that the railway company should permit the express company to carry, in the room provided on such trains, a messenger and safe, free of charge, and such express goods and matter as they might have to carry at the rates specified in the agreement; and the express company agreed, *inter alia*, that the railway company should not be liable to any person, whomsoever, for or by reason of any damage or injury which any officer, messenger, or servant of the express company might sustain upon the railway by reason of the negligence or default of the railway company its officers or servants, and that the express company would indemnify and keep harmless the railway company against any action, &c., that might be brought against the railway company by reason of such injury, &c.

This agreement was to be in force for five years from its date, and accordingly terminated on the 1st January, 1879.

A letter of the 4th April, 1879, from Mr. Broughton, the then manager of the Great Western Railway Company, to W. G. Fargo, the president of the express company, was also proved, accepting on behalf of the railway company, and re-stating, the terms on which the express company had offered their business to the railway company. The terms specified related entirely to the charges paid by the



express company for their through and local business, and the mode of payment, and guarded against the working of the latter by any competing railway. The letter concluded : "These arrangements to be embodied in a formal contract, containing general conditions such as are common in such contracts for the protection of both parties, and to be executed by the parties under their seals. The new contract to be for one year certain, and thereafter to be subject to termination on six months' notice."

The only allusion to the former contract, was a reservation of certain claims which the railway company had against the express company thereunder.

No formal contract was ever executed, and there was no evidence of what general conditions were common in such contracts.

The business of the express company was subsequently carried on by the Great Western Railway Co., and the defendants continued to carry it on in the same manner on the terms mentioned in the above letter.

There was no evidence that the deceased had notice of the terms of either agreement.

The appeal came on for hearing before this Court on the 7th of April, 1887.\*

*Osler*, Q.C., for the appellants.

*Maclaren*, for the respondent.

September, 6, 1887. OSLER, J. A.—Upon a full consideration of the facts disclosed by the evidence, I am of opinion that the judgment appealed from (of the reasons for which we have no note or report), ought to be affirmed. And first, with regard to the question of the defendants' negligence, I will observe that there was ample evidence to sustain the finding of the jury. It has been assumed, throughout, that these defendants were lawfully operating the road and exercising the franchise of the Great Western Railway, and if so, it was plainly their duty to come to a stop

\* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

before crossing the Welland Canal: *Great Western R. W. Co. v. Brown*, 3 S. C. R. 159.

This they failed to do because, as the jury have found, the air-brakes were out of order, and the hand-brakes were not applied, as they might have been, in proper time to arrest the train. The inference that the air-brakes had not been thoroughly tested before the train left the Suspension Bridge, less than half an hour before the accident, is very strong, and one which the jury were fully justified in adopting. So also as to the failure to apply the hand-brakes when it was found that the air-brakes were not working.

The other grounds of defence appear to me to have no substantial foundation.

It is almost unnecessary to look outside of the statute for reasons to uphold the validity of the plaintiff's letters of administration. The case of *Irwin v. Bank of Montreal*, 38 U.C. R. 375, and the authorities there referred to, shew that the grant of letters of administration is a proceeding in rem which cannot be questioned while it stands, if the Court had jurisdiction, and if the person on whose supposed death the administration was issued be really dead.

In *Grant v. The Great Western R. W. Co.*, 7 C. P. 438; S. C., in App. 5 U. C. L. J. 210, it was held under the former Probate Act of 33 Geo. III. ch. 8, that the jurisdiction of the Surrogate Court to grant letters of administration did not depend upon the goods of the deceased being of the value of £5, and the present Act contains no such limitation.

The status of the plaintiff as administratrix in fact, under letters of administration granted by a competent court, is clear. The objection, indeed, is not that the letters were granted by the wrong court, but that they could not be granted by any Court, because the deceased had no real or personal estate in Ontario.

A short reference to the provisions of the Surrogate Act (a) will shew that this contention is unfounded. The 16th section of the Act declares to what particular courts

the grant of probate shall belong, viz.: 1st; to the Surrogate Court of the county in which the deceased had, at the time of his death, his fixed place of abode; 2nd. If he had then no fixed place of abode in, or resided out of, Ontario, the grant may be made by the Surrogate Court of any county in which he had real or personal estate; and 3rd. *In other cases* the grant shall belong to the Surrogate Court of *any county*. In this instance the deceased had no fixed place of abode in Ontario, nor, according to the evidence, had he at the time of his death any personal or real estate in any county therein. The case therefore fell within the 3rd sub-sec. of sec. 16, and any Surrogate Court, and therefore that of York, had jurisdiction to grant letters of administration.

The 34th and 35th sections make it very clear that the existence of personal or real estate is not essential to the jurisdiction. The former provides for the proofs to lead grant, where the deceased had no fixed place of abode in Ontario.

That fact is to be made to appear by affidavit, and that the deceased died leaving personal or real estate within the county in the Surrogate Court of which the application is made, or leaving no personal or real property in Ontario as the case may be. This last clause was added by 40 Vict. ch. 7, Sched. A 62, and probably for the purpose of harmonizing the 3 sub-secs. of sec. 16.

The 35th section enacts that the affidavit mentioned in section 34, for the purpose of giving a particular court jurisdiction, shall be conclusive for the purpose of authorising the exercise of such jurisdiction, and that no grant shall be liable to be recalled, revoked, or otherwise impeached by reason that the deceased had no fixed place of abode within the particular county at the time of his death, or had personal or real estate therein at the time of his death.

It was suggested on the argument, though no point was made of it at the trial, that the deceased must have left

personal property in the county in which he died, consisting at least of clothing and trifling effects usually carried on the person, so that the grant would belong to the Surrogate Court of Lincoln, and not to that of York. The 4th sub-sec. of sec. 16, however, enacts that probate or letters of administration by whatever court granted, shall, unless revoked, have effect over the personal estate of the deceased in all parts of Ontario.

The answer to the defendants' next objection, namely, that the deceased was being carried under a special agreement with his employers, by which the defendants were absolved from liability for accidents occurring through their negligence, is, that no such agreement was proved in fact. The only agreements of which any evidence was given, were made, not with the defendants but with the Great Western Railway Company; and even if it be assumed that the defendants were working under the terms of the second agreement, viz., the letter of the 4th April, 1879, that contains no stipulation in regard to indemnity, as did the expired agreement of the 1st January, 1874. We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers, was essential to be proved in such an action as this, as the learned Chief Justice at the trial, held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct.

In the absence of actual notice to the deceased that he was travelling at his own risk, that agreement might well be regarded, as between the railway company and the injured party, merely as a contract by the express company to indemnify the railway company.

See *Alexander v. The Toronto and Nipissing R. W. Co.*, 33 U. C. R. 474; 35 U. C. R. 453, and *Gallin v. The London and North Western R. W. Co.*, L. R. 10 Q. B. 212.

There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage



between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely. It can hardly be necessary now to cite authorities upon this point. Most of them, I think, are referred to and discussed in the recent case of *Foulkes v. The Metropolitan District R. W. Co.*, 5 C. P. D. 157. To paraphrase slightly, the language there used by Bramwell, L. J., though the contract was with the express company, the plaintiff is entitled to recover against these defendants. There would be no duty of contract, and consequently no cause of action for a non-feasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another. It is clear that if a porter of the defendants had run a truck against the plaintiff at the station and hurt him he could maintain his action against the defendants. Baggallay, J., says:

“Whether the defendants were or were not entitled to any share or interest in the price paid by the plaintiff for his ticket, appears to me to be a matter of no importance as regards the obligation which they took upon themselves when they invited and received him as a passenger by their train to carry him safely to his journey’s end, and to cause him no injury by the way by wilful or careless acts or omissions.”

And in *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442, Blackburn, J., says:

“I think that what was said in the case of *Marshall v. The York R. W. Co.*, 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend upon his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely.”

As the deceased was proved to have been on the train as a passenger, the case of *Blackmore v. Toronto Street R. W. Co.*, 38 U. C. R. 172, 207, does not apply. That was

the case of a newsboy getting upon the car to pass through it as a mere volunteer by the license of the company, who lost his life in consequence of a defect in or absence of a step on the platform of the car. The distinction was there pointed out between an injury arising from such a defect and one caused by careless driving, or collision, or any other injury received in the act of carrying.

The defendants' last objection is also entirely unsupported by the evidence. The rule as stated by Erle, C. J., in *Tunney v. The Midland R. W. Co.*, L. R. 1 C. P. 291, 296, is, "that a servant when he engages to serve a master, undertakes as between himself and the master to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master of both."

Here there was neither a common employment nor a common service. The deceased was employed by the express company, and by them only; so far as appears the defendants had no control over him and no relation existed between them and him. They were simply carrying goods for the express company on terms which we may presume were sufficiently advantageous to them to permit the deceased to receive and to be in charge of such goods on their train, and in that capacity to travel up and down thereon without purchasing a ticket on each occasion. In no sense can he be said to have been engaged with their servants in a common employment of managing the train or conducting their business. He could only look to the express company for his wages, and they only, so far as appears, would have been liable for the loss of, or injury to goods, received by them for transmission, caused by his negligence; *Abraham v. Reynolds*, 5 H. & N. 143; *Swanson v. North Eastern R. W. Co.*, 3 C. P. D. 341.

On the question of damages, one point remains to be noticed. The defendants contended at the trial, and also on the appeal that the amount of the life insurance policy in favor of the plaintiff, should have been deducted from

the verdict or allowed by the jury in assessing the damages.

The learned Chief Justice was of that opinion, but felt himself obliged to rule in accordance with the then recent decision of the Divisional Court in the *Beckett Case* (a) that the existence of such a policy did not affect the damages. That decision having been affirmed by this court, and also by the Supreme Court of Canada, though with great difference of opinion, we must now take it so far as this court is concerned, that the jury were rightly directed. The judgment of the Supreme Court has not been reported, and I cannot say that I have seen any reason to alter the view I expressed on this point when the case was in this court.

I think we can only dismiss the appeal.

HAGARTY, C. J. O.—I agree that the appeal must be dismissed.

I do not think we can find any substantial difference between this case and *Beckett v. Grand Trunk R. W. Co.*, where leave to appeal was refused by the Privy Council.

For myself, I remain of the opinion that the Judge at the trial should not specifically direct the jury either to allow or disallow any life insurance falling in by the death.

The whole financial position of the deceased at his death—the pecuniary position of the widow and children consequent on the death—every advantage as well as disadvantage arising from the death—viewed solely in a pecuniary light, are proper for the consideration of the jury, who should be directed to view the claim for damages solely in such light, and considering the whole view of consequent loss or gain.

BURTON, J. A., concurred.

PATTERSON, J. A.—I concur in the judgment delivered by my brother Osler, but give no opinion as to what the

(a) *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174.

liability of the railway company would have been, or if any liability to the deceased or his representatives would have existed if he had been carried on a special contract like that which the express company had had with the Great Western Railway Company.

Asto the question of the policy, I have nothing to add to what I said in *Beckett's Case*.

[This judgment was affirmed by the Privy Council, 13 App. Cas. 800.]

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## DOMINION SAVINGS AND INVESTMENT SOCIETY V. KILROY.

*Married Women's Act—R. S. O. 1877 ch. 125 secs. 5-7—Wife's separate property.*

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock in trade, and which the vendors sold to her upon her credit exclusively, and not to her husband.

*Held*, that even though the business might not be the business of the wife carried on by her separately from her husband, within the meaning of section 7, so as to protect the earnings from her husband's creditors, the goods so sold to the wife were her own property, under section 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors.

Whether this would be so with regard to goods purchased and to be paid for out of earnings of such a business: *Quere*.

Judgment of the C. P. D. affirmed.

THIS was an interpleader proceeding to try whether at the time of their seizure by the sheriff the goods seized were as against the claimant Mrs. Catherine Kilroy, wife of the defendant, liable to be seized in execution under a writ of fieri facias, issued upon the judgment against Thomas E. Kilroy, in the action.

The issue was tried at Sandwich, on the 28th March, 1887, before Galt, J., and a jury, when, the jury having been dismissed by consent of parties, judgment was given for the claimant.



A motion by way of appeal from that judgment and to enter judgment for the plaintiffs—the execution creditors—was made before the Divisional Court on the 25th June, 1887, and was dismissed, with costs.

The plaintiffs thereupon appealed to this Court, and the appeal came on for hearing on the 17th and 18th April, 1888.\*

*Osler*, Q.C., and *W. M. Douglas*, for the appellants.

*Moss*, Q.C., for the respondent.

May 8, 1888. BURTON, J. A.—This case arose since the passing of the Married Women's Act of 1884, but the result should have been the same if the case had arisen under the former Acts.

I must confess that I entirely agree with and indorse the judgment given by Mr. Justice Galt, in *Meakin v. Sampson*, 28 C. P 360, and agree with him in the remark that, there as here, the section of the Act as to the wife's personal earnings, and the proceeds and profits of any occupation, or trade carried on by her separately from her husband, has no application whatever to such a case as that before us, where the question is not as to those proceeds or profits, but as to goods acquired by her since her marriage, it is immaterial whether by contract or by gift, so long only as they did not come to her by gift from the husband during coverture.

I attach no weight whatever to the question of whether she had any power to contract with Mr. Watt or not; that was Mr. Watt's affair, if he chose to give goods to the married woman, they would still remain her property, and would not pass to the husband; and if he sold to her knowing that she was a married woman, no fraud being practiced upon him, but the sale being carried out with such knowledge, and the knowledge that if dishonestly disposed, she could refuse to pay for them, it would not, in my view of the law, make the slightest difference; he

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

might lose the price of his goods, but that would not vest them in the husband.

The statute which was intended to remove some of the very harsh provisions of the common law respecting married women, never could have contemplated that she should be prevented purchasing goods from her own means or on her own credit, when her husband is insolvent, and unable consequently to hold property himself, and employing him to make the purchases as her agent. There is always the risk of a jury finding that the transaction is colourable, and the moneys advanced by the husband; that is a risk to which she may be unfortunately exposed; but where, as in the present case, the evidence clearly establishes that the merchant furnishing the goods, would not have entrusted them to the husband, knowing that he was insolvent, but was willing to sell them to the wife; nothing but a process which I am almost inclined to speak of as *legerdemain*, could transfer that property to the husband and make it liable for his debts.

Of course, I quite agree that where the whole thing is a scheme or device to enable the husband to obtain property and incur liabilities on the faith of that property being his from being in his apparent possession, very different considerations arise. Here, neither the execution creditors who are the claimants nor any other creditors have been deceived, and it is a question solely of property, the evidence being all one way.

The question in *Murray v. McCallum*, 8 A. R. 275, was altogether different under a different section of the Act, founded upon the property having been purchased from earnings which were not the separate earnings of the wife.

I think the appeal should be dismissed.

PATTERSON, J. A. — I think we should affirm the judgment of the Court below.

The objections urged against it are founded, as it seems to me, upon the idea that the transaction under which the

defendant claims the goods requires to be supported under the seventh section of the statute R. S. O. 1877, ch. 125.

That section protects from the husband's creditors the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys, or property.

The goods at present in question were not, like the goods which were the subject of the action of *Murray v. McCal-lum*, 8 A. R. 275, the produce of such earnings, and the title to them must be determined on other grounds.

Section five enables the wife to hold and enjoy her personal property, whether owned by her before marriage or acquired by her by inheritance, bequest, or gift, or as next of kin to an intestate, *or in any other way*, after marriage, free from the debts and obligations of her husband, the only exception being property received by her from her husband during coverture.

The plaintiffs here undertake to prove the goods to be the goods of the husband and liable to be taken in execution for his debt; not a debt contracted on the strength of any apparent ownership of these goods, but an old debt.

The husband, if he has title, must have got it in one of two ways: either as purchaser of the goods from the wholesale dealers, or by marital right to the personal property of his wife.

Now if the goods ever were the wife's, they remained hers. Section five prevented the title passing to the husband.

Can it be held that the husband purchased them, and took title from the wholesale dealers? The evidence is that they were sold to the wife, the husband acting as her agent, but paying no money of his own, and not pledging his credit. The vendors sold to the wife, and would not have given credit to the husband. Unless we hold that a married woman cannot under such circumstances purchase

goods, but that as a matter of law the purchaser is the husband, without reference to the intention of the parties, it seems to me impossible to ignore the title of the wife.

The earnings from the business and the right to them, when the business is conducted by the husband either altogether or to such an extent as to make it impossible to say that the wife carried it on separately from her husband, are different matters and need not now be discussed.

Whether the husband works the wife's farm or trades with the wife's goods, it by no means follows that because the proceeds or profits may, under some circumstances, or even under ordinary circumstances, be legally the husband's, the ownership of the land or the goods passes to him.

OSLER, J.A.—This case arises under the recent Married Woman's Property Act, 47 Vict. ch. 19 (O.), and looking at the issue alone, which is in a very unusual form, it appears to me that we can only dismiss the appeal.

That the business carried on in the store rented to the wife, was not a business carried on by her separately from her husband within the meaning of section 7 of the R. S. O. 1877, ch. 125, or 47 Vict. ch. 19 (O.), sec. 3, I have no doubt. It was simply a business not carried on by her at all, but by her husband in her name. Whether a business so carried on can be said to be one in which the husband has no proprietary interest, which is the expression used in the present Act, R. S. O. 1887, ch. 132, sec. 5, is a question which does not arise in this proceeding. But the fact of the proceeds and profits of the trade not being the wife's, is not the test of the execution creditor's right to seize the goods or stock with which the trade is carried on, as being the husband's. If these very goods were in fact sold on credit to the wife, the husband was not the purchaser, and could not have been liable for the price to the vendors. If they became the wife's, they would be, within the very words of the 47 Vict. ch. 19, sec. 3, property acquired by the married woman after marriage. If they were not the



wife's because of her inability to contract, she having no separate property, they remained the goods of the vendors; and thus, though they have made no claim in respect of them, were under the terms of the issue, not liable to be seized under the execution against her husband. It is not proved that the sale was a fraudulent or colourable sale, nor is there any satisfactory reason for thinking that the transaction was not just what the seller of the goods says it was. That being so, it is sufficient to say that, under the form of the issue the plaintiffs cannot recover.

If it had been shewn that the goods had been actually paid for, a different question would have arisen—namely, whether they had been so paid for out of the proceeds and profits of the trade, which, as I have said, clearly under the circumstances, belong to the husband.

HAGARTY, C. J. O., concurred.

*Appeal dismissed with costs.*

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## DUNKIN V. COCKBURN.

*Crown lands—Free Grant and Homesteads' Act—R. S. O. 1877, ch. 24, sec. 3—Patent—Reservation by order in council—Trespass.*

Plaintiff was a locatee of a free grant and homestead lot which at the time he located it, in May, 1877, was subject to a regulation of an Order in Council of the 27th of May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, &c. The patent in favor of plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals, and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the Order in Council.

*Held*, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the Order in Council.

*Semble*, that such regulations apply only before the issue of the patent to lands located under the Order in Council, and then only so far as rights of way, &c., are expressly conferred upon the licensee by the terms of his license.

Judgment of Q. B. D. affirmed.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division pronounced on the 11th of March, 1887, reversing the judgment entered at the trial by Rose, J., in favor of the defendant, and directing a verdict to be entered for a perpetual injunction in favor of the plaintiff and for \$100 damages with costs of suit, and came on for hearing on the 10th of April, 1888.\*

*McCarthy*, Q.C., and *Moss*, Q.C., for the appellant

*J. K. Kerr*, Q.C., and *J. A. Paterson*, for the respondent.

The facts are clearly stated in the judgment of Patterson, J. A.

May 8, 1888. PATTERSON, J. A.—I have no doubt of the correctness of the judgment of the Divisional Court, or of the views enunciated by the learned Chief Justice in the judgment he delivered as the judgment of that Court.

The matter seems to me very simple.

The plaintiff complains of a trespass committed by the defendant by entering on his land and cutting roads for

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

hauling his timber, and of personal violence by the defendant's servants.

The plaintiff is patentee of the lands.

The defendant justifies under a license to cut timber on other lands, and contends that the effect of the Free Grants and Homestead Acts, under which the plaintiff obtained his patent, was to entitle him to draw out his timber across the plaintiff's land.

We have accordingly listened to a discussion of various provisions of those Acts, a great part of which was wide of the real question, if I am right in my understanding of the matter.

The plaintiff's patent bears date the 14th June, 1883. It purports to grant, under the "Free Grants and Homesteads' Act," to Alexander Dunkin, a Free Grant settler, his heirs and assigns for ever, the lot in question "saving, excepting, and reserving, nevertheless unto us, our heirs and successors, all gold, silver, copper, lead, iron, or other mines or minerals, and the free uses, passage and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found, on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

There is nothing unusual in the form of this grant. The reservation of mines is what we are accustomed to see in other patents, as is also the exception of navigable waters which, being public highways, could not, in the absence of statutory authority, be granted by the Crown. We miss the reservation of pine trees with which we are familiar in the old provincial patents, but that is accounted for by sub-sec. 2 of sec. 10, R. S. O. ch. 24.

Section 10 enacted that all pine trees growing or being upon any land located under the Act, and all gold, silver copper, lead, iron, or other mines or minerals should be considered as reserved from the location, and should be the property of Her Majesty, giving, however, to the locatee the right to clear and cut timber for building, fencing, and fire wood; and sub-section 2 declared that all trees remain-

ing on the land at the time the patent issued should pass to the patentee.

Section 10 was repealed in 1880 by 43 Vict. ch. 4, (O.) and a new section substituted, which, amongst other things, directed that the patents for all lands thereafter located or sold should contain a reservation of all pine trees standing or being on the land, which pine trees should continue to be the property of Her Majesty.

The land now in question having been located in 1877, the patent was not governed by the Act of 1880, though issued three years after the passing of that Act.

I do not know any reason for supposing a patent issued under the authority of the Free Grants and Homesteads' Act, to have any different effect, or to be open to any different construction from any other patent; and I think that whatever difference of opinion has existed in this case, is due to the idea that the operation of the grant from the Crown, is controlled by something not expressed in the deed, but to be found either in the statute or in the regulations made under its authority.

I find nothing in the Act, as I read it, to support that view. On the contrary, the provision of the Act of 1880, to which I have just referred, which directs the reservation of the pine trees to be expressed in the patent, is an indication of the intention of the Legislature that the deed is to speak for itself.

There are provisions in the Act for the benefit of the Free Grant settler and his family, which operate after he becomes patentee. Thus, section 15 makes his wife a necessary party to any mortgage or conveyance after patent, and within twenty years from the location; section 17 gives his widow certain rights as a modification of the law of dower; and by section 18, sub-sec. 2, the land is exempted from liability for ordinary debts for twenty years from the location, while owned by the locatee or his widow, heirs, or devisees; and in furtherance of these provisions, section 16 requires the name of the original locatee and the date of the location; and also



the fact that the patent is issued under the authority of the Act, to appear on the face of the deed; but there is nothing to modify or restrict the operation of the grant.

The regulations relied on are contained in an Order in Council made on the 27th of May, 1869. No. 4 is in these words :

“4. Holders of timber licenses, their servants and agents, are to have the right to haul their timber or logs over the uncleared portion of any land located as a free grant, or purchased as before provided, and to make such roads thereon as may be necessary for that purpose, doing no unnecessary damage, and to use all slides, portages, roads, or other works previously constructed or existing on any land so located or sold, and the right of access to, and free use of all streams and lakes theretofore used, or that may be necessary for the passage of timber or logs, and all land necessary for such work is reserved.”

The license under which the defendant justifies was for the period between the 22nd of June, 1885, and the 13th of April, 1886, and no longer. It gave the right to cut timber on specified lots, not including the plaintiff's land, “with the right of conveying away the said timber through any ungranted, uncleared, or waste lands of the Crown.”

Nothing in the document can be construed to give, or purport to give any right over the land which had been granted in 1883 to the plaintiff.

The regulations of May, 1869, may or may not, as far as this defendant is concerned, apply to patented lands. My opinion is, that they do not so apply, but that they apply only before the issue of the patent to lands located under the first regulation, and to the additional 100 acres which the locatee is allowed to purchase under the second regulation. But they form a part of the contract between the settler and the Crown only, and do not create any privity with, or obligation towards the holder of a timber license, except so far as they may bind the settler to permit the exercise of such rights of way, &c., over his uncleared lands as the license confers upon the licensee.

No such right being conferred by the defendant's license

he cannot strengthen his defence by appealing to these regulations, even if they could properly be held to operate upon patented lands.

For these reasons, which I think agree substantially with the views more fully elaborated by Sir Adam Wilson in the Court below, and are also in accord with the understanding of the legislation on which the judgment in *Anderson v. Muskoka Mill and Lumber Co.*, 27 C. P. 180, proceeded, I think we should dismiss the appeal, with costs.

OSLER, J. A.—The plaintiff's patent was issued on the 14th June, 1883, under the authority of the Free Grants and Homesteads' Act, R. S. O. ch. 24, the only reservation therein being of the mines, minerals, and navigable waters in or upon the land granted. The pine trees thereon were not reserved, as the patentee was located for the land on the 11th May, 1877, prior to the amending Act 42 Vict. ch. 4 (O.) (1880), and they passed to him as from the date of the patent, the land not being included within the limits of any timber license then in force: 40 Vict. ch. 15, sec. 2; R. S. O. ch. 24, sec. 12.

The trespasses complained of were the making or using roads across the uncleared parts of the lot, and the defendant justified under the holder of a timber license over other lots in the same township from June, 1885, to April, 1886, and the authority of an Order in Council of the 27th May, 1869, made in pursuance of section 3, of the original Free Grant and Homesteads' Act, 31 Vict. ch. 8 (section 4 of the Revised Act), which enacts that the Lieutenant Governor in Council may appropriate any public lands not being mineral lands or pine timber lands as free grants to actual settlers, under such regulations as shall from time to time be made by Order in Council, not inconsistent with the provisions of the Act.

The 4th regulation of the Order referred to provides, that holders of timber licenses, their servants or agents are to have the right to haul their timber or logs over the uncleared portion of any land located as a free grant, and

to make such roads thereon as may be necessary for that purpose, doing no unnecessary damage, and to use all slides, portages, or other works previously constructed or existing on any land so located, and the right of access to, and the free use of all streams and lakes theretofore used, or that may be necessary for the passage of timber or logs, and all land necessary for such works is hereby reserved.

The only question is whether the plaintiff's land was subject to this regulation after the issue of the patent. I think that it was not. It appears to me that the locatee after he has obtained his patent stands in a very different position from that in which he previously stood. Before the issue of the patent he is no doubt subject to the regulations made under the authority of the Act. But when he becomes patentee his rights are those conferred by the patent as interpreted by the Act.

The Crown might no doubt have granted the land subject to the reservation and easement mentioned in the regulation, but there is nothing in the Act which makes it necessary to do so, or which imports such regulation into the patent.

The essential reservations from, and qualifications of the grant are those mentioned in the Act, and the Crown not having thought fit to impose any others, the patent is, in my opinion, in all other respects absolute and unqualified. It is not necessary to say that it overrides the Order in Council. It would do so if it conflicted with it.

But as I read the statute, the Order in Council and regulations have nothing to do with patented lands. Even if this construction is wrong, I think the defendant's justification fails on another ground, namely, that it is not shewn that he acquired from the Crown the right alleged to have been reserved by the Order in Council, and no such right is conferred upon him by statute as in the case of licenses which were issued under the 23 Vict. ch. 2, or in the case of patented lands which were located after the 43 Vict. ch 4, sec. 3. I refer to *Contois v. Bonfield*, 25 C. P. 39; 27 C. P. 84; *Anderson v. Muskoka*, 27 C. P. 180;

*Canada Permanent Building Society v. Taylor*, 31 C. P. 41 ; 43 Vict. ch. 4 (1880).

I think the appeal should be dismissed.

HAGARTY, C. J. O. and BURTON, J. A., concurred.

*Appeal dismissed with costs.*

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## THE BANK OF HAMILTON

AND

WILLIAM DURRELL.

*Creditors Relief Act R. S. O. ch. 65, sec. 4, sub-sec. 3—Interpleader proceedings summarily disposed of—Subsequent execution creditors—Right to participate in proceeds of execution.*

Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor which were claimed by D., whereupon an interpleader summons was obtained by the sheriff which was argued before the Chief Justice of the Queen's Bench Division who made an order barring the claimant without any issue being directed. This order did not state that the parties consented to a summary disposal of the matter and the facts did not clearly appear. The sheriff proceeded and sold the property and made an entry under the Creditors Relief Act. The appellants and several other creditors delivered certificates to the sheriff within the proper time who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him the County Court Judge gave the whole fund to the plaintiffs under sub-section 4 section 3 of the Creditors Relief Act. On appeal from such order to this Court the appeal was dismissed, the Court being equally divided.

*Per* BURTON and PATTERSON, JJ. A. As there was a contest between the execution creditor and claimant and an adjudication in favor of the former the proceedings which took place upon the interpleader summons came within sub-sec. 4 sec. 3 of the Act, and entitled the plaintiffs to the whole proceeds of the property and the order appealed from was correct.

*Per* HAGARTY, C. J. O. The circumstances of this case do not bring it within that section and the appeal should be allowed and the moneys distributed as if no interpleader proceedings had been taken.

*Per* OSLER, J. A. The order disposing of the interpleader summons was not a proceeding under the Interpleader Act because it did not shew on its face the consent of parties to the summary disposition of the claim; but even if it was an interpleader proceeding it was not within the mischief of the Act which intended to provide only for the case where an issue has been directed.

THIS was an appeal from a judgment of the Judge of the County Court of the county of Bruce, on the contestation to the scheme of distribution prepared by the sheriff of the county ordering him to pay the whole amount realised from the goods of the debtor to the claimants.

It appeared that an execution in favor of the claimants, reached the hands of the sheriff on the 11th of May, 1887, under which the sheriff, on the 6th July, following, seized a quantity of chattels, which were claimed by one J. B.

Drewry, for an alleged claim of \$800, \$350 whereof he claimed to be a preferred claim for wages.

Thereupon the sheriff obtained an interpleader summons and the matter came on for argument before Wilson, C. J., on or about the 10th of August, when an order was made barring Drewry, who applied subsequently for an order for further time to appeal, which application was refused and then Drewry appealed from that order.

That the claimants, the Bank of Hamilton, were the only creditors of Durrell, who were parties to the interpleader proceedings, other than Drewry; Messrs. Sloan and Mason, who were the only other execution creditors, having declined to become parties to those proceedings.

The affidavit of Mr. Robertson, solicitor for Drewry, Clatworthy, and Tamblyn, set forth, that Clatworthy and Tamblyn, on the 8th of November, 1887, placed certificates under the Creditors Relief Act, in the hands of the said sheriff for the amount of their respective claims, and that Drewry, on the 18th of the same month, in like manner placed a certificate for the amount of his claim.

On the matter coming on before the Judge of the County Court, the learned Judge after stating the facts as above set forth proceeded:

“Tamblyn and Drewry were employés of Durrell, and the sheriff proposes to pay them as preferential creditors under sec. 3 ch. 29, 48 Vict. The Bank of Hamilton contests their right and that of Clatworthy, on the grounds that under 50 Vict., ch. 8, not having contributed to the adverse claim of Drewry, they cannot share in the proceeds of the goods seized.

There is no question that these moneys were levied by the sheriff and are distributable under sec. 8 of the Creditors' Relief Act.

The notice required by the Act was entered on 21st October, and within thirty days Clatworthy filed his certificate, as did the other two parties, Tamblyn and Drewry, who shew themselves employés within sec. 3, ch. 29, 48 Vict., and the sole question is whether these parties were cut out by reason of the provision contained in 50 Vict., ch. 8 as to interpleader proceedings. Under the clause referred to in 50 Vict., ch. 8, where proceedings are taken under the provisions relating to interpleader, those creditors only who (1) are parties thereto (2) who agree to contribute, pro rata in proportion to the amount of their executions, (shewing that they must at the time be *execution* creditors) to the expense of contesting any

adverse claim, shall be entitled to share in any benefit which may be derived from the contestation of such claim. Now what are the proceedings and what is a contest? The interpleader proceedings are for the protection of the sheriff. He, it is supposed without collusion, and independent of the direction of either party, calls the claimant and the execution creditors before the Court. Then the claimant appears by affidavit, sometimes the Court says: 'On your own shewing Mr. Claimant you have no right, Mr. Sheriff proceed, do your duty.' Until the claimant's affidavit is heard, and the same held sufficient to justify the Court in directing an issue, no creditor is in a position to be called upon to agree to share the expense of a contest, as up to that moment it cannot be told what are the grounds of the claim, or whether the claimant had a claim at all that could be considered as such; surely some time must be allowed for the creditor to say whether he will contest the claim or not, and up to that time, i. e., until the nature of the claim as set forth by affidavit is heard, I do not think a creditor need elect to say whether he is going to contribute to the expense.

But suppose that at that juncture the Judge says there is no claim here to contest, it is urged this provision of the statute can have no effect under such circumstances, and should it be held otherwise every fraudulently disposed execution debtor by getting some person to set up a fictitious claim could deprive his employés of their preference or his other creditors who had not obtained judgment of their rights; or a judgment creditor by a like device, might cut out all the creditors who had not obtained their certificates, including employés. \* \* \* It is further urged that it is directly opposed to the manifest intention of the Act that employés and others who would otherwise be entitled to share in the distribution of money levied out of the property of a debtor should thus be cut out, where there really was no contest, and perhaps no necessity for an application under the Interpleader Act at all; and in this case it does appear by the affidavit of the solicitor for the Bank of Hamilton that the application of the sheriff for an interpleader summons was by his direction.

On the other hand it is urged, not without force, that the papers filed shew that there was in reality a contest, an earnest strife for mastery; that such contest took place before Chief Justice Wilson; that I must presume that he acted with full jurisdiction, and that if consent was necessary to enable him to adjudicate that it was given or should be presumed from the fact of the parties proceeding with the argument before him; and that the now claimants cannot properly share in the distribution. (1) They were not parties. (2) Had no execution upon which their pro rata share could be ascertained. (3) They did not agree to contribute, and therefore are excluded by the Act.

Sec. 3, ch. 29, 48 Vict. provides that employés who shall become entitled to share in the distribution of moneys levied out of the property of a debtor within the meaning of the said Act shall be entitled to be paid in preference to other creditors.

The being, entitled to share, means, I take it, having their execution or

certificate in the hands of the sheriff in thirty days, and the clause gives no preference that can oust the provisions of 50 Vict. subsequently passed.

From the best consideration I have been able to give the matter I think I should now direct the sheriff that the Bank of Hamilton are entitled to be paid in full. No costs."

The appeal came on to be heard before this Court on the 22nd of May, 1888.\*

*H. J. Scott*, Q.C., for the appellants Clatworthy, Tamblyn, and Drewry.

It is submitted that the judgment of the Court below is erroneous and ought to be reversed and, the motion made by the Bank dismissed.

It is shewn that the appellants duly obtained certificates under the Creditors' Relief Act of the validity of their respective claims against the debtor William Durrell, and delivered the same to the proper officer, within one month from the entry by said sheriff of the notice of the levy by him on the property of the debtor.

There was not, we contend, any interpleader proceedings in regard to the goods from which the money was made as contemplated by 50 Vict., ch. 8, (R. S. of Ont., 1887, ch. 65 sec. 4, subs. 3).

No issue was directed and the goods were not ordered to be sold, and there was no trial and no opportunity ever arose if there had been other execution creditors for them to elect whether to go on and share the expense or abandon their rights: *Levy v. Davis*, 12 P. R. 93; *Reid v. Gowans*, 13 A. R. 501; *Dundas v. Darvill*, 8 C. L. T. 51.

Here it is shewn that the claims of Drewry and Tamblyn were for wages, and part of these were preferential under 48 Vict., ch. 29, sec. 3, and as to such parts, at least, they were entitled to be paid in full and the scheme of distribution was therefore correct.

*Wallace Nesbitt* and *J. Jackson Scott* for the respondents, The Bank of Hamilton, contended that the words of the

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



statute restricted the parties entitled to share in the levy to execution creditors, whose claims must be certified, and they are required to contribute to the expense of the litigation.

June 29, 1888. HAGARTY, C. J. O.—I agree in allowing this appeal. A contrary decision must, I think, cause the statute to have an effect which I am satisfied could never have been intended by the Legislature.

Execution issued in May; claim was made by Drewry in July, and the sheriff obtained interpleader summons. In August his claim was barred by order of Wilson, C. J., and no issue was directed.

On 21st October the sheriff's entry of money levied was made, and claims were to be filed within 30 days under the statute. A number of claims were filed. If no creditor can get anything unless he be a party to the proceedings under sec. 4, sub-sec. 3, R. S. O. 1887, ch. 65, and who agrees to contribute to "the expense of contesting any adverse claims," this construction in a case like this would bar all who may have become creditors after August and before the expiration of the 30 days ending 21st November.

Some of the creditors may have had no existence, as such, at the time of the application for interpleader. Again, it is said in the clause that the creditors to share are to "agree to contribute *pro rata* in proportion to the amount of their executions or certificates." It is not easy to understand how either those who had not yet become creditors or who had neither execution nor certificate could have entered into any such agreement. I am wholly unable to apply this clause to the present case. If the language of the statute be clear and precise we must obey it without reference to its effects. But if the language be doubtful and ambiguous, then we must be careful, if possible, to construe it so as not to create an absurdity.

I agree that the clause does not apply to bar any of the creditors from their right to share under the statute.

It will probably be found very difficult to give the clause in question any interpretation which will be of general application to all cases. My decision is confined to the facts in evidence here, and I do not pretend to be able to declare its full effect. The main object of this Act seems clearly to ensure equality among creditors where the sheriff has levied money on execution. It makes a formidable inroad on the general law, but we must try to carry out its clear intent. Then comes this curious section in restraint and qualification of the general intent. It appears to me to be, in a case like the present, impossible to apply.

Eight claims appear in the scheme of distribution. The interpleader application was made in July and dismissed in August. Six of the eight claims appear for the first time filed under the statute in October and November.

I do not profess to understand, much less to explain, how they or any of them could be made parties and agree to contribute to the expense *pro rata* in proportion to their respective executions or certificates.

BURTON, J. A.—In November, 1886, the case of *Reid v. Gowans* was before this Court, and the Court equally divided upon the question of whether moneys paid into Court under an interpleader order to abide the result of an issue as to the title of the property seized in execution could be said to be “moneys levied or made under execution,” within the meaning of the Creditors’ Relief Act, and some observations were made in the course of that case as to the obvious injustice of one creditor being at the entire expense of contesting a claim, and then being compelled to share the proceeds equally with others who had previously abstained from any interference, and it was to obviate that injustice, no doubt, that the present amendment was made.

It is contended that it can only apply to cases in which an issue has been directed and sent down for trial, and it is quite possible that that may have been the particular

case in the mind of the draughtsman of the amendment, although that is by no means clear.

It is not possible in this case to draw any general inference from the nature and objects of other portions of the Act, as upon principle there is no more reason for allowing a creditor who comes in within 30 days from a particular date to participate in the proceeds of a levy by the sheriff than there is for excluding one who comes in within 31 days.

It is better, therefore, to ascertain the intention of the legislature by means of the words it has used, if that be possible. In this case proceedings have been taken by the sheriff for relief under the Interpleader Act, and he has brought before the Court all those creditors whom it was his duty to bring before it.

This would include not only the claimant but all persons then having executions; and if there had been a previous levy all persons who had lodged certificates. Of the persons thus made parties to those proceedings, the only parties who contested the claimants' right were the bank.

We can only assume from the nature of the order made that the claimant did not relinquish his claim, but endeavored to maintain it, and we must also, I think, assume that the learned Chief Justice in entering upon the matter and disposing of the claim acted with full jurisdiction. There was then a contest between the Bank of Hamilton and the claimant, which was adjudicated upon and decided in favor of the bank. The other creditors who claim here were not parties to the interpleader proceedings nor to the contestation, and are not, therefore, in the words of the Act entitled to share in any benefit derived from it.

I therefore think that the order made was right, and should be affirmed, and this appeal dismissed.

PATTERSON, J.A.—We have to construe, with reference to particular facts, the 3rd sub-sec. of sec. 4 of the Creditors' Relief Act, R. S. O., 1887, ch. 65, which is an amendment introduced by 50 Vict. ch. 8 into the original Act, 43 Vic. ch. 10.

Difficulties arise, or seem to arise, in the attempt to arrive at the proper effect of the enactment, but I think they are solved by giving the language its direct and natural meaning, and leaving it to the Legislature to supplement or amend the provisions if they do not reach the object intended in their present shape.

It is hardly a matter of surprise that imperfections should be found in a measure which aims to establish a system that, apart from bankruptcy legislation, is new to this Province. The Legislature has not been slow to move in the matter of remedying defects in the law when they have come to the surface. Thus the anomaly in the case of *Porteous v. Meyers*, 12 A. R. 85, was promptly met by an amendment enacted by 49 Vict. ch. 16, sec. 35, and the amendment now in question probably owes its origin to the opinions expressed in *Reid v. Gowans*, 13 A. R. 501. In that case my brother Osler remarked (p. 524) on the probability that serious hardship and injustice would in the future, as in the past, be inflicted on creditors who should contest, ultimately, perhaps, at their own expense, claims to goods seized under execution. The amendment aims at averting the hardship and injustice. When we apply ourselves to the task of construing it, it will be useful to bear in mind that it deals only with contests that arise after goods have been seized by the sheriff, and is not a general measure touching all cases in which a creditor may have, at his own expense and risk, attacked an adverse claim, and succeeded in setting it aside. In a case *e.g.* like *Longeway v. Mitchell*, 17 Gr. 194, the contest may be over before any execution can issue, and the salvor, though he has championed the common cause, if he gains any special advantage out of the salvage, as between himself and the other creditors, does not gain it by virtue of this Act. He may not even be preferred in respect of his costs, under sec. 65, which gives the preference to the execution under which the sheriff makes the money.

These are reasons for giving effect to the provision before us according to the direct and natural meaning of the



language without attempting to extend or abridge it by any subtlety of construction.

Sub-sec. 3 is, in my judgment, to be read as an exception to the general scheme of section 4.

The general scheme is that all creditors who have executions or certificates in the sheriff's hands at the time of, or within 30 days after, his entry of the notice of the levy shall share ratably in the money. But if an adverse claim to property seized under the executions shall have been made; and if the sheriff has taken proceedings for relief under the Interpleader Act; and if the adverse claim is contested by one or more of the creditors; only those creditors who are parties to the proceedings taken by the sheriff, and who agree to contribute pro rata to the expense of contesting the adverse claim, shall be entitled to share in any benefit which may be derived from the contestation, so far as may be necessary to satisfy their executions or certificates.

The data are (1) an adverse claim; (2) proceedings by the sheriff for relief; and (3) a contest under the interpleader proceedings. If the adverse claim succeeds, the execution creditors have to abandon the property, and those who contested the claim have to bear the expense of the contest; but if the claim is defeated, their reward is that they alone share in the property saved until their executions are satisfied. If a surplus remains it falls under the general scheme, but the plain words of the clause seem to me to exclude all other creditors from sharing except in the surplus.

The claimants for ratable shares of the surplus may be more numerous than the claimants could have been if the property had been sold without a contest, because by the late amendment (51 Vict. ch. 11, sec. 1) when money is paid into Court by a sheriff under an interpleader order, pending the trial of an issue, he is not to make the entry until it is paid out to him again for distribution; and the entry will be at least equally late when the goods are not sold till after the decision of the interpleader contest; and so,

the time of distribution being postponed, debts may come in which matured too late to share in an earlier distribution ; but still they can only share in the surplus, if I am right in my reading of the clause.

The persons to share must answer both parts of the description. They must be parties to the proceedings taken by the sheriff for relief, and they must agree to contribute to the expense of the contest.

The sheriff makes all who have executions in his hands parties to his proceedings for relief, but (as happened in this case) some of them may not agree to contribute to the expense of contesting the adverse claim against which he seeks to be relieved.

To bring in other creditors as parties would be something hitherto unknown to the procedure under the Interpleader Act.

No provision is made by this statute for new parties intervening during an interpleader contest. On the contrary, the description of those entitled to share under subsec. 3 includes only parties to the sheriff's initiatory proceeding.

The question then is, do the data exist in this case ?

The sheriff seized the goods on the 6th July, 1887, and they were claimed by Drewry under an assignment from the debtors.

We are not furnished with the particulars of the assignment, nor with anything like precise information of the proceedings on the interpleader application.

We have all that was before the Judge in the Court below, and it may be said that although the affidavits are rather loose in their statements, which is notably the case in the affidavit in which the solicitor for the plaintiffs gives his impression or recollection of the grounds on which Sir Adam Wilson decided against the assignment, yet there does not seem to have been any dispute as to the facts. What is loosely stated on one side could easily have been made certain by the other side, if there was any difference in the understanding of the matter.

The assignment to Drewry seems to have been intended for the benefit of creditors.

There was, then, as the first datum, an adverse claim, that is, a claim adverse to the right of the sheriff to seize the goods.

The sheriff thereupon took proceedings for relief under the Interpleader Act. There were three executions: that of the plaintiffs and those of two business firms. The claimant Drewry and the plaintiffs appeared on the interpleader summons, the two firms declining to appear, the reason suggested being, no doubt, the true reason, that Drewry's claim was in their interest.

We have thus the second datum in the proceedings by the sheriff.

There was then a contest within the meaning of the Act.

No issue was directed.

The claimant Drewry supported his claim by affidavit, and affidavits in answer were filed on the part of the plaintiffs.

The matter was heard before Chief Justice Wilson, and after enlargements, was argued by counsel on the 10th of August, 1887, and disposed of by the following order, which is dated the 12th of August, 1887:

"Upon the application of the above-named sheriff; upon reading the affidavits filed on behalf of the sheriff and of the claimant and of the execution creditors, and upon hearing what was alleged for all parties by counsel.

"It is ordered that the said claimant J. B. Drewry be and he is forever barred from all claim to the goods and chattels seized by the said sheriff herein, and that the costs of the said sheriff to be taxed be paid to him, said costs to include the costs of the seizure and possession, and of the interpleader proceedings, and of this order and proceedings thereon, and it is further ordered that no action be brought against the sheriff of the county of Bruce for any alleged trespass to goods or lands arising out of the seizure made in the action of the Bank of Hamilton against the said Durrell. And that the claimant do pay to the sheriff his costs as aforesaid, and also do pay to the plaintiffs their

costs of this motion to be taxed. I do further order that the interim orders for carrying on the business are discharged."

The precise ground of the decision, which was against the validity of the assignment, is not easy to gather from the affidavit of the plaintiffs' solicitor, which is our only source of information; but it seems to have been generally that the assignment offended against the second section of the Act R. S. O. 1887, ch. 124, or 48 Vic. ch. 26, and, not being made to the sheriff or assented to by the necessary proportion of creditors, was not aided by the third section.

Drewry, it is said, attempted unsuccessfully to appeal against the order.

I see no satisfactory reason for holding that there was not here a contesting of an adverse claim.

The plaintiff certainly never admitted the claim, and Drewry never withdrew it.

Under the Interpleader Act, R. S. O., 1877, ch. 54, sec. 3, the Court or Judge may upon the rule or order obtained by the sheriff hear the allegations of the claimant and of the execution plaintiffs, and may, *inter alia*, direct the trial of an issue between them, but may, by section 5, upon consent of those parties, determine and dispose of the merits of their claims in a summary manner, and make such other rules and order therein as to costs and all other matters as appear just and reasonable. By section 6 any such order made by a single Judge, not sitting in open Court, may be rescinded or altered by the Court in like manner as other orders made by a single Judge; and section 7 treats the summary decision in the same way as a judgment of the Court, declaring that "the judgment in any such action or issue so directed by the Court or Judge, and the decision of the Court or Judge in a summary manner shall, in cases in the Superior Courts of Law, be final and conclusive upon the parties, and all persons claiming by, from, or under them."

I have nothing to do at present with the consideration of what judgments in interpleader proceedings are or are not reviewable in appeal, or whether or not the right to



appeal is affected by the declaration that the decisions are final and conclusive. If that subject were entered upon we might find, particularly in view of the cases commented on in *Whiting v. Hovey*, 12 A. R. 119, that the words "in cases in the Superior Courts of Law" had slipped into the section during the revision from an idea that might not be easy to maintain, that a difference was intended between the finality of decisions in Superior Court cases and those in County Court cases, from which an appeal to a Superior Court was given by 27 Vict. ch. 14 (now sec. 23), and we should doubtless have to consider whether the effect of section 5, which became law with us under 7 Vict. ch. 30, sec. 1, following the Imperial Act, 1 & 2 Wm. IV. ch. 58, sec. 1, amended by 1 Vict. ch. 45, sec. 2, is the same as sec. 14 of the English C. L. P. Act, 1860, a decision of a Judge under which section was held, in *Dodds v. Shepherd*, 1 Ex. D. 75, not to be subject to appeal. We are concerned merely with the question whether or not this was a contest, and that question depends on the nature and object of the proceeding, and not on the power of appealing from one tribunal to another.

The case last cited, which was one in which the validity of a bill of sale was pronounced upon, is an example of a contest without appeal.

I conclude, therefore, that there was a contest, which is the third datum.

Another question is whether the contest can be held to have been decided.

The jurisdiction of the Chief Justice depended on the consent of the parties. No consent is stated on the face of the order in express terms, and two gentlemen speak of the matter in their affidavits. One of them says his firm acted as solicitors for Drewry in the interpleader proceedings, the deponent having control of the proceedings for Drewry, and that so far as he is aware, and to the best of his knowledge and belief, there was no consent whatever on behalf of Drewry to the claim being disposed of in a summary manner. The other gentleman, who is a barrister-

ter of the city of Toronto, says that from the papers filed on the interpleader application he has not been able to find anything shewing consent to the matter being summarily disposed of by the Judge. These statements stop very far short of negating the fact of consent.

The papers do not appear to have been before the learned Judge in the Court below, and they are not before us, but the consent need not have appeared upon them.

There is no doubt from the form of the order that the learned Chief Justice meant to dispose of the merits of the claim. The disposition of the costs also is one which is appropriate only to a final disposition after a contest. It appears from the order that both parties appeared by counsel, and supported their contentions by affidavits. All this indicates consent, as, if the Chief Justice was not to dispose of the merits there was no purpose in what was done.

It is argued that a statement of the consent ought to appear on the face of the order, and I find direct authority for that proposition in *Harrison v. Wright*, 13 M. & W. 816, where Parke, B., said that an order, undistinguishable from the one we are considering, was bad as a proceeding under the Interpleader Act for want of a statement of consent on the face of it. On the other hand, we may refer to *Dodds v. Shepherd*, 1 Ex. D. p. 75. The clause in question there authorized a Judge, in certain cases, "at the request of either party," to dispose of the merits in a summary manner. On the point as to the decision being intended to be final, Huddleston, B., remarked during the argument: "From what passed at Chambers it must be taken that the learned Judge, at the request of one of the parties, undertook to determine the merits in a summary manner under sec. 14 of the Common Law Procedure Act, 1860."

The fact giving jurisdiction, *i. e.*, the *request*, does not appear to have been stated in the order, and though the decision of the Court was that no appeal lay under the Interpleader Act, and that the Judicature Act had not given one, the discussion assumes that the parties were

bound by the order, no one suggesting that it was invalidated by the absence of the formal statement.

These two cases seem to balance each other, and I refer to them without attempting to follow up the subject, because I do not think it can influence the decision of the appeal.

If the order of Chief Justice Wilson did not decide the merits of the contest, they are still undecided, and the claimant Drewry should have long ago insisted on an issue to try his title. He has not done so, but has submitted to the order, and now appears as a claimant for a ratable share of the money made by the sale under the plaintiffs' execution, which sale would not have taken place but for the order which barred his claim to the property.

His position is not unlike that of the plaintiff in *Harrison v. Wright*.

The order there barred the plaintiff, who was the execution creditor, and the sheriff in pursuance of it gave up the goods to the claimant. The defendant, treating his debt as unsatisfied, issued a *ca. sa.* against the defendant in that action, under which he was arrested and imprisoned. He also paid the costs of the claimant and the sheriff. Afterwards discovering that there was other property of the debtor not included in the assignment to the claimant, he ruled the sheriff to return the *fi. fa.*, and on his returning *nulla bona* brought this action for a false return, relying on the want of jurisdiction to make the order without consent. He was, however, held bound by the Judge's decision as an award. Parke, B., said: "No doubt the order is bad as a proceeding under the Interpleader Act for want of a statement of consent upon the face of it; but the parties agreed to be bound by the decision of the Judge as to whom the goods belonged to," &c.

Alderson, B., expressed the same opinion, which was concurred in by Rolfe, B., who had made the order.

It is out of the question that Drewry could now treat the sheriff as a trespasser in making the money which he asks to share in.

But if, as against Drewry, the sheriff's sale must or can be supported as a valid sale, what has brought about that result? It is, in my judgment, a benefit derived from the contestation of Drewry's claim, and therefore within the terms of sub-section 3.

For these reasons I think we should affirm the judgment of the Court below, and dismiss the appeal with costs.

OSLER, J. A.—It is difficult to give sub-sec. 3 of sec. 4 of the Creditors' Relief Act a construction which shall be consistent in all respects.

Proceedings were no doubt taken by the sheriff under the Interpleader Act, the result of which was to bar the claimant in his character of assignee for the general benefit of the creditors of the execution debtor. The merits of the claim were heard and disposed of in a summary manner, but the order is bad as a proceeding under the Interpleader Act for want of a statement of the consent of the parties upon the face of it to the claim being so disposed of. That is decided by *Harrison v. Wright*, 13 M. & W. 816, which also shews that the order is nevertheless good and final as an award between the parties to it, there being evidence from which it may be inferred that they had agreed to be bound by the decision of the Chief Justice.

The only execution creditors who were parties to the proceedings, namely, the Bank of Hamilton, now contend that they are now entitled to the whole of the money in the sheriff's hands, to exclusion of subsequent execution and certificate creditors (among others the claimant, who re-appears in that capacity), who came in after the entry of the notice of the levy, which was made more than two months after the order, and represents the proceeds of the goods which had been the subject of the claim.

I do not think that this order is such an interpleader proceeding as is contemplated by sec. 4, sub-sec. 3 of the Creditors' Relief Act, for two reasons :

1. Though an order which as an award barred the claim of the assignee, it is not, for the reason I have mentioned,



an order under the Interpleader Act, and therefore, though as an award it may be effectual to prevent the assignee from setting up his claim under the assignment, it cannot debar him or others from ranking as execution creditors under the general provisions of the Creditors' Relief Act, because there has been no contestation or disposition of an adverse claim under the Interpleader Act.

2. Even if the order is to be regarded as an order under that Act, I think, looking at the latter part of sub-sec. 4, that we must hold that what was intended to be provided for is the case where an issue has been directed between some creditors and the claimant. Until an issue is directed no one can have the carriage of the proceedings but the sheriff. A case in which the claim is tried summarily by the Judge on the hearing of the summons and barred, is not within the mischief of the Act.

The provision, no doubt, was intended as a sort of shift to prevent the apparent injustice of a creditor contesting an interpleader issue at his own expense, taking the risk of failure and liability to costs, while others came in afterwards and shared the spoil. This state of things can hardly be said to arise where an issue is not directed and the Judge decides the case summarily. Practically there are no costs in a case of that kind beyond those necessarily incurred on the sheriff's application. But take a case where several executions or certificates are in the sheriff's hands and an adverse claim to the goods seized. All execution and certificate creditors are made parties to the sheriff's summons. One or more determine to contest the claim, and the rest are barred. Do those who carry on the contest do so for their own benefit to the exclusion of subsequent creditors as well as of those whose writs were in the sheriff's hands at the date of the interpleader summons? If they do not they may find that they assume a very thankless and unprofitable task in contesting the claim. The section is in principle like that provision of the Insolvent Act by which a creditor was permitted to take proceedings for his individual benefit where the assignee refused to take them.

Sec. 1 of the Act of 1888, 51 Vict. ch. 11, may indicate that subsequent creditors are intended to share in the proceeds of the goods, as it provides that if they are sold under the interpleader order *pendente lite* the entry of notice of the levy is not to be made until the money is paid out of Court to the sheriff for distribution. This looks as if creditors who lodge their writs, &c., during the following month are to share. If they do there seems not much reason in excluding the earlier ones, even though they took no part in the issue. But it must needs be that offences will come in attempting to administer an Act which professes not to be an insolvent Act, yet is intended in some respects to do the work of one.

I agree that the appeal must be allowed.

*The Court being equally divided the appeal was  
dismissed with costs.*

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## CONNELL V. HICKOCK.

*Bills of Sale and Chattel Mortgage Act—Marriage settlement of personal property—Description of property settled—Interpleader issue—Equitable title—Possession.*

By an ante nuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part and one M. of the third part, in consideration of the intended marriage certain lands and the goods in question consisting of horses, cows, and several articles of household furniture described as being in and upon and around the premises and appurtenances used and occupied by the said J. M. and being city number etc., were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns.

The marriage took place on the 27th of March. Within five days from the execution of the assignment it was duly registered in the proper office as a bill of sale. The affidavit of *bona fides* was made by the plaintiff after the marriage, she being described therein as the bargainee.

The goods were afterwards seized by an execution creditor of the husband ; the plaintiff claimed them and an interpleader issue was directed by the High Court to be tried in the County Court.

At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant.

*Held*, [reversing the judgment of the Court below] that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schræder v. Harnott* 28 L. T. N. S. 702 followed : (2) That the plaintiff was a person who, as bargainee, might properly make the affidavit of *bona fides*. (3) That the goods were sufficiently described and identified.

*Seemle, per* HAGARTY, C. J. O., and OSLER, J. A., that a marriage contract or settlement in the form of the instrument in question, was not a sale of personal property within the Act and that registration therefore was not necessary.

*Per* PATTERSON, J. A. (1) That the transaction was within the statute and (2) that the legal title to the goods was in the plaintiff.

*Whiting v. Hovey*, 12 A. R., 119. *Dominion Bank v. Davidson*, 12 A. R. 90 referred to.

THIS was an appeal by the plaintiff from the County Court of the County of Wentworth and came on for hearing before this Court on the 23rd of May, 1888.

*J. W. Nesbitt*, for the appellant.

*Staunton*, for the respondent.

The facts are clearly stated in the judgments.

*Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

September 12, 1888. HAGARTY, C. J. O.—Appeal from Wentworth.

An interpleader issue was directed to be tried of an issue in which the plaintiff affirmed, and defendant denied that certain chattels seized in execution by the sheriff, were her property as against the defendant.

On the plaintiff's marriage with James Connell, a marriage settlement was executed on 25th March, 1887, by which in consideration of the intended marriage, James Connell conveyed certain lands, and also certain chattel property, to Martin Malone, habendum to him and his heirs to grantor's use till marriage, and after solemnization thereof to the use of the said Mary Harrington, her heirs, executors, administrators, and assigns, to and for her and their sole and only use for ever.

The marriage took place, and the parties lived together. The wife claimed that the goods remained always in her possession and use. They conducted a milk business, which she claimed belonged to her. The settlement was duly registered.

At the trial it was objected (*inter alia*) that she could not maintain the action; that the trustee Malone, as the legal owner, could alone sue.

The learned Judge held that the right of action was vested in Malone and not in plaintiff. Plaintiff then applied to add Malone as a plaintiff.

The learned Judge held that he could not make this amendment, as the issue was sent to him for trial from the Superior Court. He directed the issue to be found in favor of defendant. The plaintiff appeals.

We think that in an interpleader issue the plaintiff would be a proper plaintiff, and that the right and title proved in evidence in her was sufficient.

It was said in *Rusden v. Pope*, L.R. 2 Ex. 277, "It would be a very narrow view of the Interpleader Act, to hold that it was not intended to confer upon the Court a jurisdiction to determine equitable rights."

It was admitted in that case that the equitable claimant



could not sue at law. It was asked why should he be driven to proceed in equity? Of course there is now no such distinction.

A case cited by Mr. Nesbitt is in point, *Schrøder v. Har-nott*, 28 L. T. N. S 754, 1873, the head note is to the effect that a cestui que trust in possession of settled goods by virtue of an authority from the trustees is entitled to the same as against the execution creditors of a debtor living in the house wherein the goods are, and the trustees need not be parties.

Bovill, C. J. "The issue is not whether the property abstractedly considered is in plaintiff, but as to whether the plaintiff has a right to the goods, as against the defendant."

The defendant is responsible to the plaintiff who is in lawful possession of them.

Grove, J., added that either the trustees or the plaintiff in possession were the owners and the question as to who should be the claimant was a mere matter of form.

We think that the plaintiff had a clear right to be plaintiff in this case.

*Duncan v. Cashin*, L. R. 10 C. P. 554, recognizes the equitable right and interest very clearly in interpleader claims. *Shingler v. Holt*, 30 L. J. Ex. 322, may be also referred to.

I do not think that the objection as to the sufficiency of the description of the goods should prevail. They are all described as being in upon or around the premises, &c., used and occupied by said James Connell, being city lot No. 130 Catharine street in the city of Hamilton. I think that the evidence shews sufficiently that the goods seized were goods covered by the settlement and used by claimant since the marriage.

It seems clearly distinguishable from the case cited of *McCall v. Wolff*, in the Supreme Court. (13 S. C. R. 130.) The difficulty there seems to have arisen in the endeavour to describe quantities of millinery and dry goods in a shop. The late Mr. Justice Henry points out the true ground of decision. I think this case is distinguishable.

I cannot find that on the objection urged at the trial it became a question whether there were other articles of like description in Connell's premises beside those conveyed by the settlement, so that any difficulty as to identification would arise.

If attention had been distinctly called to this at the trial it might have been fully explained. Most of the animals and articles assigned are well described. The horses, milk sleighs, buggy, cooking range, self-feeding stove, walnut bedstead, are respectively described so as to be capable of identification. Then twenty-eight large cans used for milk and all other articles and utensils used by Connell in his dairy. Locality is given to all the articles assigned. I think on the objection as taken, we may hold it sufficient.

I do not understand that the case below was decided on any such ground as appears in *McCall v. Wolff*. In his reasons for judgment the learned Judge does not say that he has given effect to it, and the reasons of appeal do not refer to it, as would have been the case if the point had arisen and been adjudicated.

Most of these objections disappear if it be held that this marriage settlement did not require registration, in other words that it was not a "sale" of goods and chattels under that Act.

There have been a number of decisions in our Courts for many years to the effect that a deed of assignment for creditors was within the statute. This was strongly questioned as good law by the Queen's Bench in *Robertson v. Thomas*, 8 O. R. 20, and as far back as *Harris v. Commercial Bank*, 16 U. C. R. 443, the late Sir J. Robinson differed from the majority who held that it fell within the statute.

In this Court in *Whiting v. Hovey*, 12 A. R. 119, my learned brother Osler reviewed the cases from 11 U. C. R. downwards, pointing out that such assignments had for a series of years been held to be within the Act. But his judgment and that of the majority of the Court, held that there had been an actual and continued change of possession, so that the objections as to the description of goods, &c., under the

statute could not prevail. For myself, I did not discuss or consider the necessity of registration as the actual possession was proved.

As then pointed out, the late legislation as to assignments for creditors renders the discussion as to the necessity of registration, as only of historical interest.

There is no express decision to my knowledge as to registration of an assignment like that before us.

In *Leys v. Macpherson*, there is a good deal of discussion as to the effect of an assignment made direct by the husband to the intended wife in consideration of the intended marriage; this was registered, but the decision did not turn on any question as to that, as the Court treated the instrument not as a marriage settlement, but a direct transfer for a good consideration to the intended wife, so that on the marriage they became her separate property.

I feel the greatest difficulty in holding that this settlement can be described as a "sale of goods and chattels" under our statute.

As Sir J. Robinson, says in *Harris v. Commercial Bank*, after noticing the distinction between conveyances of realty and personalty and the use of the words "bargainor and bargainee:" "We have to deal here with goods and chattels, and it has not seemed to me that the Legislature has used the words "every sale of goods and chattels," in these statutes in any other sense than their common acceptance as applied to goods: that is when the absolute beneficial interest passes from a seller to a buyer."

I certainly must put the same construction on our statute, and I cannot at present see how this transaction can be held to be "a sale of goods."

It seems to be treated in some of our cases that a transfer of the property for a good or valuable consideration is "a sale."

One of my learned brothers suggests that if the marriage did not take place within the five days prescribed by statute, it would not be easy to see how the trustee could register the instrument with an affidavit that "the sale" to

him was *bonâ fide* and for good consideration. Calling it a "sale" to the trustee seems to be repugnant to the words used by the Legislature. The intended wife could hardly make such an affidavit, at least before consideration executed.

The legal meaning of the words, "sale of goods," is discussed fully in the last English edition of Benjamin (1883) pp. 1, 2, 3, and quoting the definitions of *Blackstone*, *Kent*, &c., seems to make *price* an essential element. "It may be defined to be a transfer of the absolute or general property in a thing for a price *in money*," distinguishing sale from barter or exchange.

I do not wish to rest a decision on the narrow ground of the necessity of a price in money, but in endeavouring to expound the meaning of the words of our statute, we cannot overlook these distinctions. Here the absolute property is transferred to the trustee, and remains in him, not passing out of him, as I understand it, so as to vest absolutely in the cestui que trust on perfecting the consideration by the marriage, but still remaining in the trustee for his benefit.

I am unable to understand how this arrangement falls within the words of our statute.

A disposition of chattels like the present, is certainly within the mischief sought to be prevented by the statute, and if my view be correct, the legislature will, it is hoped, apply a remedy.

BURTON, J.A.—It is not in my view of the case, necessary to express any opinion as to whether a marriage settlement is within the provisions of the Bills of Sale Act, so as to require registration; but if it is within it I think the Act has been sufficiently complied with.

As there can be no such thing as an estate in personal property, it follows that at law the assignment to Malone passed the absolute property to him. But the rule of the common law as to the indivisibility of a chattel had no place in the modern Court of Chancery, which in adminis-



tering equity carried out to the utmost the intentions of the parties.

Here it is evident that the transfer was made for the purpose of securing to the intended wife, not the annual returns of the property, but the absolute control and the beneficial interest in it. Since the change in the laws relating to the property of married women, there is no end to be served in retaining the property in the trustee, his trust is at an end when, in pursuance of the intentions of the assignor, he hands over the property to the wife, and in my view, that property upon delivery, vested entirely in her. But for the purpose of this interpleader proceeding it is quite immaterial whether the property was in her or in Malone, as against the execution creditor, her possession was sufficient, unless the objections to the validity of the bill of sale are good.

The sole question is, whether this property in the possession of the wife was liable to seizure and sale under an execution against the husband, and apart altogether from the changes effected by the Judicature Act it is clear that the property could not be seized for his debts, and that judgment therefore should have been entered for the claimant, who as against the execution creditor, was entitled to hold the property.

The objections to the validity of the bill of sale, are :

1st. The insufficiency of the description.

2nd. The alleged defect in the affidavit which was made by the wife as the bargainee.

I think that there are abundant authorities, some of them a quarter of a century old, for holding the description sufficient, and I have no doubt that in the very words of the Act it does "contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished."

If the wife could not, as bargainee, make the affidavit of bona fides, it furnishes to my mind a very strong reason for holding that the case is not within the Act. I do not see how Malone could, by any stretch of ingenuity, be

described as bargainee. The claimant insisted upon this settlement as a condition of the marriage, the name of Malone was used as a piece of the machinery for carrying that arrangement or bargain into effect, and whether she is the absolute owner, or entitled by the rules of equity to assert her interest, she is, I think, properly described as the bargainee, and the only party filling that position.

Although all the evidence is in, I should still think it a case in which we could only interfere by granting a new trial upon the question of fraud if there was any evidence proper to submit to a jury; but there is no evidence upon which a jury could reasonably or properly find that the marriage was resorted to as a mere device to protect the property from creditors. Upon that branch of the case, therefore, it would have been proper for the Judge to direct a verdict for the plaintiff, and we are in the same position.

The appeal, therefore, should be allowed, and judgment entered for the claimant, with costs.

PATTERSON, J. A.—Hickock is the execution creditor of James Connell. He has seized goods as the goods of James which are claimed by Mary the wife of James.

In this interpleader issue Mary Connell is plaintiff and Hickok is defendant, and the question to be decided is whether the goods are the goods of Mary as against Hickock.

The goods had belonged to James, *dum solus*.

On the 25th of March, 1885, he made a deed in which he was party of the first part, with Mary Harrington as party of the second part, and Martin Malone as party of the third part, by which in consideration of his intended marriage with Mary he (*inter alia*) assigned the goods to Malone to have and hold the same, to Malone and his heirs to the use of Connell and his heirs, executors, and administrators until the intended marriage and thereafter to the use of Mary, her heirs, executors, administrators and assigns to and for her and their sole and only use for ever.

The only question decided by the learned Judge of the County Court was that Malone and not Mary Connell was

the person to assert, as against the execution, the title derived under the deed from James. He considered, principally, as I understand, because the issue was sent down from the High Court, that he was not authorised to make Malone a party claimant, and he gave judgment for the defendant in the issue.

The appeal is from that judgment.

The decision seems to have been founded on two propositions: that the legal title was not in the plaintiff, and that an equitable title, though involving the whole beneficial interest, would not sustain the plaintiff's claim.

There can be no question at present of the right to assert in any of our Courts a title which in former times could only have been asserted in a Court of equity. The distinction between the classes of rights which are known respectively as legal and equitable rights, must for some purposes continue to be recognized, otherwise, as remarked by Lindley, L. J., in *Joseph v. Lyons*, 15 Q. B. D. 280, 287, the distinction between trustee and cestui que trust would be abolished. Cases will no doubt continue to arise in which, as in *Joseph v. Lyons*, and in *Hallas v. Robinson*, 15 Q. B. D. 288, the ownership of property and the security of transactions may turn on some phase of the old distinction; but when the beneficial owner comes into Court to maintain his right against a wrong doer or, as in this case, an execution creditor of a stranger to the title (James Connell being regarded as a stranger in this branch of the case) it is a matter of indifference which of the old designations is the more appropriate to his title.

The case cited by Mr. Nesbitt, of *Schræder v. Harnott*, 28 L. T. N. S. 704, and the case of *Duncan v. Cashin*, L. R. 10 C. P. 554, decided in 1874 and 1875, just before the dawn of the Judicature Act had brightened into day, affirmed the right to insist upon an equitable title in interpleader with an execution creditor, and the same thing had been held a few years earlier, Bramwell, B., dissenting, in *Rusden v. Pope*, L. R. 3 Exch. 269, where there was no execution in question. But the doctrine was very clearly

enunciated thirty years ago in *Edwards v. English*, 7 E. & B. 564, by Lord Campbell, C. J., in these terms :

“ Upon the issue in this case the question was, whether the creditor had a right to seize the goods. It was quite immaterial which party was plaintiff in the issue ; that was the substance of it. Here, had English been plaintiff, and begun, and proved a *primâ facie* case, Edwards would at least have shewn a *primâ facie* case in answer by shewing a *bonâ fide* bill of sale to herself duly registered. In answer to that the existence of a prior invalid bill of sale might have been shewn ; but the very utmost effect of that is to shew that no strict legal property was in Edwards, by no means shewing that the property was liable to be taken in execution as Hare’s.”

Erle, J., and Crompton, J., made remarks to the same effect.

But it is, in my opinion, a misunderstanding of the transaction to treat the plaintiff’s title as the equitable title only, and not the legal title.

From and after the marriage, that is to say, as soon as the consideration for the transfer became executed and not executory merely, the possession as well as the whole beneficial interest in the goods passed and was intended to pass to the plaintiff. The settlement included land as well as goods. The *habendum*, as to the lands, was in these words :

“ To have and to hold the said premises unto the said Martin Malone his heirs and assigns to the use of the said James Connell and his heirs until the said intended marriage, and after the solemnization thereof to the use of the said Mary Harrington her heirs and assigns forever.”

Being, as we may reasonably assume, so framed in order that Mary might, by force of the statute of uses, take the legal fee simple, there was no reason why the seisin in Malone should continue. The declaration of the use as to the goods, though on similar terms, would of course have no operation under the statute, but it nevertheless expressed the intention ; the intention was carried into effect by the delivery of possession, constructively so far as any act of Malone is concerned, (he never apparently having had the



actual possession) and the objects of the trust were thereby fulfilled.

The principle is the same on which *Carne v. Brice*, 7 M. & W. 133, and *Bird v. Peagrum*, 13 C. B. 639, were decided. It was held in those cases that money paid over to a married woman by the trustees of her settlement, or rents paid to her in pursuance of the trusts on which settled premises were held, became her property, and the trustees ceased to have any interest in or control over them. The consequence, which at common law was that the money vested in the husband, no longer follows. The language of Williams, J., in *Bird v. Peagrum*, may be applied to the goods now in question, reading goods in place of money or rents. He said, 13 C. B. 650 :

“As soon as the trustees paid over the rents to the wife, they ceased to have anything further to do with it, their trust as to that was discharged. That being so the legal consequence follows, that the money became a chattel in possession.” Adding the now inapplicable result: “and the property of the husband.”

Then the plaintiff being entitled to be heard on this issue in maintenance of her right, and the property being hers as against her husband, why should it be liable to seizure for his debts?

The ground taken is that some requisite of the Act relating to Mortgages and Sales of Personal Property, R. S. O. 1877, ch. 119 has not been complied with.

I am prepared to hold that the transaction is within the statute. The fifth section enacts that every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit \* \* of the bargainee \* \* that the sale is bonâ fide and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor.

No kind of transaction can be imagined in which the policy of the Act more decidedly calls for publicity than where goods which were a man's property and in his possession before his marriage, continue in his possession after his marriage, but have become the property of his wife.

The transaction is a sale, as I understand that word to be used in the section. The word, "sale," cannot have the limited meaning by which it sometimes denotes a transfer of property for money as distinguished from barter or exchange. The nature of the consideration for which the transfer is made, must be stated in the conveyance and verified by the affidavit of the bargainee; but whatever the consideration is for which the owner parts with his property, the parting with it for consideration is evidently what is here called a sale.

In this transaction the consideration was marriage, executory until the ceremony, and executed after the marriage was solemnized.

I believe the marriage took place the same day that the deed was executed, and the deed was registered within five days from its date.

It may be asked how the statutory requirements of registration within five days could have been satisfied if the marriage had happened to be postponed beyond the five days. The answer seems to be that a marriage contract does not, in view of this statute, differ from any other contract by which the bargainor agrees that his goods shall belong to the bargainee on performance by the latter of his or her part of the contract. The statute does not require that before registration the consideration shall be executed. But if that were the rule the parties would have to arrange their dates and events so as to be able to comply with it. The reasoning that would support the validity of an unregistered agreement for the transfer of goods in consideration of a future marriage, would have equal force if the consideration were a future payment of money.

There are only two objections of any importance taken

to the registration of this settlement. One is that the goods are not sufficiently described.

I do not think we could give effect to that objection without requiring a degree of minute description that would render transactions impossible, and such as in many cases in our Courts has been held not to be required.

I do not understand the decision in *McCall v. Wolff*, 13 S. C. R. 130 to have introduced a stricter rule of construction. The question there was the sufficiency of a description which was not like the one before us, and while three of the five Judges who heard the case agreed with the Manitoba Court in holding that description defective, I do not understand the difference of opinion between them and their colleagues to have extended beyond the reading of the particular document. I may therefore refer to the judgment of Mr. Justice Strong, though he was one of the dissentients, as expressing the spirit in which our Courts have usually dealt with this question, and to the cases noted at p. 136 of the report, without consuming time by collating this description with those pronounced upon in the several decisions.

It was also urged that the plaintiff, on whose affidavit of bona fides the deed was registered, was not the bargainee. I have already answered this objection in what I have said on the subject of the plaintiff's title to the goods. She is a party to the deed and to the bargain evidenced by it, and is literally as well as in reality the bargainee.

I think the plaintiff entitled to judgment on the interpleader issue, and to have the appeal allowed with costs.

OSLER, J. A.—This Court undoubtedly held in *Whiting v. Hovey*, 12 A. R. 119, that an assignment for the benefit of creditors was, as for thirty years previously it had been uniformly held to be, within the Act relating to Bills of Sale and Chattel Mortgages. But in that particular case the omission to register did not defeat the instrument because an actual and continued change of possession had taken place prior to the execution coming in. In upholding the deed as

we did, on that ground, it followed that we affirmed the necessity of registration if there had been no change of possession; for if the deed had not been within the Act, neither one nor the other would have been essential.

Our reason, however, for holding an assignment to be within the Act was, that we thought the Courts were precluded from reversing a long settled and uniform rule of decision, more especially as the legislature had recently recognised the law as thus established by enacting by 48 Vict. ch. 26, sec. 12, that in future it should not be necessary to register such assignments, but that notice of them should be given in another way.

I do not think we are precluded by our decision in *Whiting v. Hovey*, from now considering whether a marriage contract or settlement in the form of the instrument in this case, is within the Act. In practice I think it has always been so treated though the question has not hitherto been presented for judicial decision, so far as I am aware.

What the statute enacts is that every *sale* of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels *sold* shall be in writing accompanied by an affidavit of the *bargainee* that the *sale* is *bonâ fide*, and for good consideration as set forth in the conveyance, &c., and not for the purpose of enabling the *bargainee* to hold the goods against the creditors of the *bargainor*.

The use of the words "sale," "bargainee," "bargainor," may indicate that what the legislature had in view was the ordinary common law sale of personal property which is termed a "bargain and sale of goods," and which has been defined as "a transfer of the absolute or general property in a thing for a price in money." *Benjamin on Sales*, p. 1.

Lord Blackburn's definition is wider, agreeing rather with that given by Kent, and including the case where the consideration given is not money, and which may, he says, in popular language be called barter rather than sale. "The



legal effect is the same in both cases." *Blackburn on Sale*, 2nd ed. Introduction p. 9, *Commonwealth v. Clark*, 14 Gray, 372. "In both cases the title to the property is absolutely transferred, and the same rules of law are applicable to the transaction whether the consideration for the contract is in money or by way of barter."

The transaction in question cannot be described as a sale within the meaning of any of these definitions. It is a special executory contract which may result in the transfer of the beneficial interest in the property to one of the parties to it, though not by way of bargain and sale. An immediate change of possession is not contemplated, nor, it may be said, any such change of possession as the Act requires as the alternative of registration, and the beneficial interest in the property remains in the grantor or settlor until the marriage takes place. Notwithstanding this, and the fact that the consideration is executory, the instrument, apart from the operation of the Bills of Sale Act, is valid against creditors of the settlor from the time of its execution, unless from delay in carrying out the marriage contract or otherwise, it becomes open to the imputation of fraud.

If this be not so, registration before the marriage would not save it, although, if it is within the Act, it should be capable of being registered immediately and effectually. Of the many modes by which personal property may be transferred or an interest in it created by the owner in favor of another person the legislature has specified but one, namely, a sale. The conditional sale evidenced by what is generally known as a hire receipt, is not included (see 51 Vict. ch. 19) nor, as I think, a contract for the conveyance of after acquired chattels. *Coyne v. Lee*, 14 A. R. 503.

It is worth noticing that in the English Bills of Sale Act, 1878, a marriage contract or settlement is expressly excepted although it would have been included by some of the general terms used in describing the instruments declared to be within the operation of that Act.

Upon the whole, I think we are not warranted in extending the meaning of the term "sale" so as to include by construction a contract of this nature. It would follow that the requirements of the Act as to description and registration do not apply to it. But if such an instrument is within the Act, I am of opinion that in this case those requirements have been sufficiently complied with. The affidavit of bona fides, it is true, was made by the wife and not by the trustee, but she is a party to the instrument, which was registered immediately after the marriage, and within the prescribed time. If the word "bargainee" is to receive the wider meaning of "contractee" I can see no reason why the wife, who was one of the contracting parties, and was at the time of making the affidavit the one beneficially interested, should not have made it rather than the trustee who is merely the nominee of the two principals. In my opinion she is a bargainee within the Act, if the Act applies to such an instrument.

The description of the property is also made sufficiently clear by the evidence, to take the case out of the point ruled by *McCall v. Wolff*, 13 S. C. R. 130, upon the particular terms of the instrument there in question. There seems no reason to doubt that the milk cans seized were some of those mentioned in the deed. I think the onus is on the defendant to make it appear that there were other goods on the premises of the same kind in order to raise a doubt as to the identity of those now in question.

Then as to the appeal itself (for the objections I have been considering were taken by the respondent in support of the judgment below); the plaintiff was nonsuited on the ground that she was not the proper person to make and maintain the claim, and that the trustee, in whom the legal title to the property was vested, should have been plaintiff. It has, however, long been settled that in an interpleader issue the Court will take notice of equitable rights. The trustee might no doubt have been the claimant, but the property is really the wife's and not the hus-

band's, and her beneficial interest in it entitles her to resist the claim of the execution creditor. The well known cases of *Duncan v. Cashin*, L. R. 10 C. P. 554, and *Engelbach v. Nixon*, *ib.* 645, establish or affirm the principle, and the case of *Schræder v. Harnott*, 28 L. T. N. S. p. 704, cited by Mr. Nesbitt, is precisely in point, where the wife, as here, was the party to the interpleader issue instead of the trustee, and maintained her claim against a similar objection. See also *Dominion Bank v. Davidson*, 12 A. R. 90.

The appeal must, therefore, be allowed, and judgment entered for the claimant in the Court below, unless the defendant thinks it worth while to take a new trial for the purpose of submitting to the jury the question whether the settlement and marriage were part of a scheme to defraud the husband's creditors, which we were told was the meritorious objection intended to be relied upon. As to this, the following cases may be referred to: *Ex parte Cooper*, *Re Pennington*, 4 T. L. R. 643; *Re Pearson*, 3 Ch. D. 807; *Ex parte Bolland*, L. R. 17 Eq. 115.

The claimant is entitled to the costs of the appeal; and, as part of the costs of the cause to the costs of the last trial; but if a new trial is taken, she will receive the costs of the former trial only in the event of her succeeding upon the new trial.

*Appeal allowed with costs.*

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## MOLSONS BANK V. McMEEKIN, EX PARTE SLOAN.

*Division Courts—R. S. O. (1877) ch. 47—Sects. 163, 165, 166, 168, 221—Transcript of judgment to County Court—Division Court execution—Return of nulla bona after expiration of writ—R. S. O. (1887) ch. 51, Sects. 220, 223, 224, 226, 380—Third party moving to set aside judgment.*

The plaintiffs recovered judgment in the Division Court and issued an execution thereon under which nothing was made and which expired by lapse of time. At the request of the plaintiffs' solicitor the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their Division Court judgment in regular form and filed the same in the office of the clerk of the County Court and sued out a writ of *fi. fa.* goods in order to obtain the benefit of the provisions of the Creditors' Relief Act.

The respondent S., the holder of a warrant of execution in the Division Court, then moved to set aside the plaintiffs' proceedings and they were accordingly set aside by the County Court Judge on the ground that the judgment in the court was void, being founded on a return to an expired execution.

*Held*, that a return of *nulla bona* where there were goods, was no more than an irregularity to be complained of by the defendant.

*Ontario Bank v. Kirby*, 16 C. P. 35, followed.

Nor could a third party object that such a return was made at the instance of the solicitor of the plaintiffs.

*Held*, also [reversing the judgment of the County Court] that a return of *nulla bona* could be properly made after the expiration of the writ and that the transcript and judgment in the County Court founded thereon were valid and regular.

THIS was an appeal from an order of the Judge of the County Court of the county of Wentworth, setting aside the plaintiffs' judgment in that Court at the instance of one Sloan, the holder of a Division Court judgment against the defendant, and came on for hearing on the 17th of May, 1888.\*

*Muir*, for the appellants.

*Carscallen*, for the respondent.

May 22, 1888, the judgment of the Court in which the facts are fully stated, was delivered by

OSLER, J.A.—The plaintiffs (appellants) recovered a judgment against the defendant in May, 1887, in the 1st Divi-

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.



sion Court of the county of Wentworth, and the warrant of execution issued thereon having expired or become spent by lapse of time, and nothing having been in fact made under it, the bailiff to whom it was directed, at the request of their solicitor returned it nulla bona, although, as it is said, there were goods of the defendant out of which the judgment debt might have been levied during its currency. At the time this return was made there was a warrant of execution against the defendant's goods in the hands of another Division Court bailiff on a judgment recovered by the respondent Sloan in the 9th Division Court of the county of Wentworth.

The appellants then procured from the Division Court clerk a transcript of their judgment pursuant to sec. 165 R. S. O. (1877,) ch. 47, which they caused to be filed with the clerk of the County Court, and to be duly entered by him pursuant to sec. 166.

The transcript so filed and entered, thereupon by force of sections 166, 168, became a judgment of the County Court, on which the appellants were entitled to pursue the same remedies as if it had been originally obtained in the County Court. On their face the transcript and judgment comply with the requirements of the Act, and are in all respects regular. The plaintiffs then issued a *fi. fa.* goods upon their judgment and delivered it to the sheriff, who seized the defendant's goods, including those already under seizure under Sloan's warrant. On a sale by the sheriff the proceeds would be distributable under the Creditors' Relief Act, among all the execution creditors of the defendant; whereas where the only creditors are those holding Division Court judgments, the Act, as it is said, does not apply.

The respondent who was thus disappointed in retaining the priority which would have been his had there been no execution in the sheriff's hands, moved to set aside the appellants' judgment in the County Court, substantially on the ground that it was founded upon an invalid or void return of nulla bona to the warrant of execution on their Division Court judgment. It was contended that this

return had been procured by fraud and collusion, and had been made at the request of the plaintiffs' solicitor, and not in the ordinary course of the bailiff's duty, and that it was a mere nullity, the execution to which it was made having expired.

The learned Judge of the Court below set aside the judgment. We have the advantage of a full statement of his views in the carefully prepared opinion which appears in the appeal book. He says:

"The return must be made on an existing or otherwise valid writ, and be the spontaneous act of the officer uninfluenced by the act of any one having control of the writ, and in the ordinary course of his duty. But the writ was invalid and could not be acted upon. There could be no return of it, and any so-called return was a mere void proceeding. That being so, *Farr v. Robins*, 12 C. P. 25; *Jacomb v. Henry*, 13 C. P. 377; and *Hope v. Graves*, 14 C. P. 393, are ample authority to shew that the judgment cannot stand. It is the inherent right of the Court to entertain an application to set it aside. My opinion is not formed upon the ground that the return was made at the instance of the solicitor for the plaintiffs, but that the judgment is void as being founded on a return to an expired execution."

We think the charge of fraud and collusion, (which the learned Judge appears to have properly disregarded, but which was renewed before us), is quite unfounded. The plaintiffs' warrant of execution in the bailiff's hands was no longer in force. No effective levy had been made under it. The plaintiffs might no doubt have issued a new warrant. But if they could procure a valid return of nulla bona to the former, they were at liberty to do so, and to make such use of it as the law and practice of the Court would permit, in converting their Division Court judgment into a judgment of the County Court. Of the legal result of the proceedings under such a judgment, the respondent cannot complain.

There is nothing in the objection that the return was made at the instance of the plaintiffs' solicitor. There can be no difference in this respect between a Division Court

warrant of execution and a fi. fa. goods issued on a judgment in the High Court. In *Ontario Bank v. Kerby*, 16 C. P. 35, it is pointed out by Wilson, J., that a return of nulla bona by the sheriff, where there are goods, is no more than an irregularity to be complained of by the defendant if the creditor be wrongfully abusing the process of the Court by going directly or by collusion against the lands in place of first exhausting the goods. Here the creditors were not abandoning any existing execution, although, as is suggested, they may have lost the benefit of one by not renewing it while it was in force.

The sole question therefore is, whether the respondent is in a position to object to the sheriff's return of nulla bona. If that was merely a void proceeding, the County Court judgment being founded on a fatally defective transcript, could not stand, as is shewn by the cases already referred to, and the respondent as a person prejudicially affected by it, might move to set it aside: *Semple v. Nicholson*, 4 H. & N. 298. Mr. Muir objected that the defendant should have been made a party to the application, citing *Jacques v. Harrison*, 12 Q. B. D. 165, and we are disposed to agree with him, though it is not necessary to decide that point, as we think the appeal must be allowed on the principal ground.

Section 163 of ch. 47 R. S. O. 1877, as amended, and as it now stands, in the Revised Statute of 1887, sec. 220, enacts that every execution shall be dated on the day of its issue, and shall be returnable within thirty days from the date thereof, but may, from time to time, be renewed for six months from the date of such renewal.

If, therefore, it is not executed, or renewed in the first instance within thirty days from its date, its operation is spent, and it cannot be renewed or acted upon afterwards. It is hardly necessary to cite authorities for this. The rule is the same as in executions issuing from the High Court. Nothing can be done under an execution after it has ceased to be current except to perfect that which has been begun under it: *Doe Greenshields v. Garrow*, 5 U. C. R. 237 ;

*Lee v. Howis*, 30 U. C. R. 292. So in *Gardiner v. Juson*, 2 E. & A. 188, 210, where the sheriff after a writ of fi. fa. lands had become returnable, nothing having been done under it up to that time, made a return that he had seized lands to the value of \$5, which remained in his hands unsold for want of buyers, proceeded to sell the defendant's lands under a ven. ex. which had been issued on such return, the sale was set aside because the ven. ex. had no foundation to rest upon except the spent writ against lands, to which of course no such return could have been made. The case was precisely the same as if the sheriff had sold the land under the expired writ instead of under the ven. ex. Had there been an inception of the execution under the former, it could have been continued and completed under the latter. But such cases have no application here. It was argued by Mr. Carscallen, and has been so held by the learned Judge of the County Court, that because the execution had expired, and could not be renewed, no valid return of nulla bona could be made to it. This by no means follows. During its currency it was a valid writ, and the officer's power to execute it continued until the return day. If the money was not made under it up to that time, it ceased to be operative, and became simply an unexecuted writ. The officer may have been unable to execute it because there were no goods which could be levied under it, but if he had the power to execute it up to the last moment of the return day, he must have the right to inform the Court after that time why he had not done so.

That is assumed by section 221, (sec. 380 of the Rev. Act of 1887) which provides that if the bailiff neglects to return the execution within three days *after the return day thereof*, an action shall lie against him and his sureties.

If the purpose of a return is considered, and the former practice of the Superior Courts, it will at once be seen that there can be no objection in principle to a return of nulla bona being made after the expiration of the writ.



It is merely a statement of the reason why the writ was not executed.

“Returns are nothing else but the sheriff’s answers touching that which he is commanded to do by the Queen’s writ, and are but to ascertain the truth of the matter.” *Watson on Sheriffs*, 89.

“The return is the sheriff’s answer to the process delivered to him.” *Churchill on Sheriffs*, 339.

“If nulla bona has been returned to a fi. fa., the party may sue out an alias fi. fa. and upon the return of nulla bona to that, a plu. fi. fa. may be issued. In practice, in the above cases, where nothing has been in fact levied, it is usual to issue the subsequent writ without getting the return previously made, and so long as the return is made in time to be used on an application to set aside the subsequent writ for irregularity for want of it, that will suffice.” *Archbold’s Practice*, 14th ed., 868.

We are of opinion that the judgment is not open to objection by the respondent on any ground which has been urged against it. If the bailiff chose to take the risk of making a false return, that was a matter for his own consideration. The defendant does not object to it, and perhaps under the circumstances could not do so, but it was not a defective or void return merely because the execution had ceased to be operative.

The appeal must therefore be allowed.

*Appeal allowed with costs.*

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## SUTHERLAND V. COX.

*Broker—Agreement to buy and carry stock on margin—Failure to purchase—Novation—Right to recover back margin paid.*

Plaintiff employed F. as his broker to purchase shares in Federal Bank stock and to carry the same for him until 1st December on margin, depositing with him a large sum of money for that purpose.

F. transferred his business to the defendants in July and with it paid over to them the whole of the money which had been left in his hands by the plaintiff and they assumed F.'s contract with the latter. On the 10th of August they informed him of this by letter.

On the 12th October the defendants called upon plaintiff to put up \$2,000 additional margin, the stock having fallen in value, and on default they professed to sell and represented to him that they had sold his shares at a loss and charged him with the difference thereon—upwards of \$2,000.

It appeared that F. had never bought shares for the plaintiff; that he had not transferred and that the defendants had never received any shares from him for the plaintiff. The alleged sale of these shares with the loss or difference on which the defendants had charged the plaintiff was a mere pretence, defendants never having had any shares of the plaintiff to sell and the broker with whom they had made the arrangement to become the pretended purchaser having bought none from them.

*Held*, that the plaintiff was entitled to recover the money he had deposited with F. and which the defendants had received from him, as money had and received.

A contract by a broker to purchase stock for a customer is not satisfied by the broker holding himself liable to account for the market value of the stock when the customer calls upon him to do so or then purchasing stock to comply with the demand.

If any such custom existed among brokers, of which there was no evidence, it would not be binding on the customer, unless he knew of it and specially submitted to its conditions.

Judgment of the Court below affirmed.

THIS was an appeal by the defendants Cox and Worts from the judgment of the Common Pleas Division (reported 6 O. R. 505) and came on to be heard before this Court on the 21st of January, 1887.\*

*Lush* Q.C. and *W. Cassels*, Q.C., for the appellants.

*D. E. Thomson* and *D. Henderson* for the respondent.

The facts are fully stated in the present judgments and in the report of the case in the Court below.

March 10th, 1887.—BURTON, J. A.—The plaintiff employed one Farley, a broker, to purchase 500 shares of Federal Bank stock on margin and to carry the same at 8 per cent. interest until the 1st December following.

\**Present*.—BURTON, PATTERSON, OSLER JJ. A. and FERGUSON J.

In the absence of any express stipulation or agreement, nothing further being shewn than the mere retainer of the agent so to act for the principal, I should suppose, and the authorities appear to sustain that supposition, that the broker upon the receipt of the margin agrees to purchase for the customer the stock indicated, and either to advance him or procure an advance of the money required for the purchase beyond the margins so furnished on the security of the stock : to have that stock so purchased, or at all events an equal number of shares of the same stock in his name or under his control and ready for delivery to the customer on payment of the advances and his own charges.

And the evidence shews that in a contract of this kind the customer's undertaking is to keep up the margin according to the fluctuations of the market.

This is the way in which this transaction was treated by the plaintiff in his original statement of claim.

He assumes that in pursuance of his instructions, Farley had purchased the 500 shares of stock and that he had obtained a time loan upon them up to the 1st December, following, from Mr. Moat, of Montreal, upon which he was to pay interest.

If the plaintiff had, before the transfer by Farley to these defendants, discovered that Farley had failed to comply with his instructions and had in point of fact never purchased any stock for the plaintiff, but had been charging him interest upon a fictitious loan, can there be a doubt that on the discovery of the imposition he could recover back the money as money paid to him for a particular purpose to which he had not applied it, as well as the interest so wrongfully exacted ? I cannot imagine that it can admit of any doubt.

If I am right in assuming that these would be the relations of the plaintiff and Farley, as principal and agent in the original transaction—let us see what followed.

The plaintiff left the country, for a time, leaving instructions with an agent here to attend to the margins if necessary, and to act generally for him.

In the month of July shortly after the plaintiff had left, Farley went out of business and transferred it to the defendants, who advised the plaintiff's agent that they had received from Farley 500 shares of Federal Bank Stock on account of the plaintiff, and had paid him \$75,807.54, on which they charged interest at 8 per cent. till the 1st December next as per arrangement.

Plaintiff returned in August, and in reply to a letter from him requesting an account of how the stock stood received the following reply, dated the 10th August, 1883 :

" We took over your 500 Federal from Farley on 19th July, paying him \$75,807.54, and assuming his loan on same at 8 per cent. until first December. Am going to N. Y. to-day. Back on Tuesday."

The plaintiff appears to have heard some rumors to the effect that the stock had never been transferred by Farley to Cox, and he called upon him to ascertain the fact, and in answer to his inquiry was told, according to the plaintiff's evidence, that he had the stock and that it was under loan to Mr. Moat, of Montreal, adding that if you sell it you will have to be charged interest up to the 1st December, the right to do which, the plaintiff says he disputed as that was not his arrangement with Farley : Cox replied he had nothing to do with that ; that was his, Cox's, arrangement with Farley.

Mr. Cox does not state this conversation precisely in the same way, but looking at the nature of the inquiry, the answer was intended to convey to the mind of the plaintiff the same impression.

He says I told him I was " long " with Moat.

I have already pointed out that in his original statement of claim the plaintiff assumed that the stock had been purchased and pledged in accordance with what I assume to be the legal effect of such a retainer, and the defendants in their statement of defence allow him to remain under that misapprehension, but set up what they describe " as a reasonable and well understood custom and practice prevailing among stockbrokers of the city of Toronto, and



their customers respecting transactions in stocks of the nature of those in question, by which the broker who purchased on margin for a customer, or with whom bank stocks were pledged as security for advances made by him thereon, was, in the absence of any special contract or agreement to the contrary entitled to treat the stocks as money or bank bills, and to deal therewith as to him might seem best, he being bound at any time to return to the customer or pledgor thereof on demand or repayment an equal number of shares in the same bank." If by this is meant, that the broker is not bound to return the identical shares, I see nothing unreasonable in the alleged custom, but if it is meant that the broker is at liberty to use the shares as his own, and dispose of all the shares in his possession so as to be compelled to go into the market and purchase fresh shares in order to comply with his customer's demand, I must demur to such a custom being either reasonable or warranted in law. As well might it be contended that if a person had stored with a warehouseman 1000 bushels of wheat which was mixed with his own, or with the wheat of others who had also warehoused their wheat with the same warehouseman, the latter would be entitled to dispose of the whole of the wheat so stored, and leave the owner of the 1000 bushels the personal responsibility of the warehouseman. No doubt he would have the right of going on selling in bulk, any of the wheat so stored belonging to him and delivering to the holders of warehouse receipts the quantity called for by those receipts, so that the identical grain could not be restored, but that would be immaterial if he had on hand all the time a similar quantity of grain of the same quality and character ready to be delivered on demand.

But the custom now contended for is very different; it was urged that it was not necessary in a transaction of this nature for the broker to purchase the stock at all, but all that was contemplated was that the broker should become liable to account for the market value of the stock whenever the plaintiff called upon him to do so, or then to purchase stock to comply with the demand.

No doubt a person employing a broker may engage his services upon any terms he pleases, but there is nothing in the facts of this case to shew that Farley was employed in any other way than as an ordinary broker to purchase the shares and carry them on the terms specified. The learned Chief Justice who tried the case says that he treats the case as one to be decided on the ordinary rules and customs regulating the trafficking and speculating in stocks. I do not find anything whatever in the evidence to shew any such custom ; but assuming such a custom to have any existence among brokers, it could not possibly apply in the case of a person employing a broker to act for him in such a transaction unless it were shewn not only that he knew the custom but especially submitted to its conditions, and of this there is no evidence.

I do not at all question that the plaintiff's object, as is stated in the first reason of appeal, was speculation in Federal Bank Stock, but that appears to me to be a widely different thing from speculating in the ability of Mr. Farley to meet his engagements ; and I should require very clear evidence to satisfy me that he was willing to pay the large sum of \$2,226 in addition to his margins for having the option of calling upon him for the period agreed on to account for the market value of the stock.

If, then, the plaintiff having given such instructions to Farley, had at any time discovered that he had not obeyed his instructions and had not purchased the stock, I do not think there can be a doubt of his right to recover back the money deposited as a margin to assist him in making the purchase.

But it is said that however this may be as regards Farley, the liability of these defendants must depend upon the terms of the arrangement made between them and Farley, and that the plaintiff is bound to adopt or repudiate it as a whole and that if he repudiates it there is no privity between him and the defendants. But this is losing sight of the fact that the arrangement which the plaintiff supposed he was adopting was a transfer to the defendants of

his shares with the liability upon them of the time loan, in other words that he was employing them as his brokers to carry the shares upon the same terms as he originally employed Farley.

It is perfectly clear that no shares were transferred to Cox & Co., on this account, although he falsely represented to the plaintiff that they had been, and it is equally clear that Cox & Co. got the benefit on account of the margin deposited by the plaintiff with Farley, and when this action was brought the plaintiff was under the impression that the stock had been transferred to Cox & Co., and the real facts were not disclosed until they were extracted from the defendants upon their examination; the plaintiff was then undeceived, and he thereupon amended his statement of claim.

Under these circumstances I do not see how any different rule is to be applied than would have been applicable if the action had been brought against Farley. The defendants undertook to carry these shares on the terms originally agreed on, and so soon as the plaintiff discovered that the shares never had been transferred, but that his money had been deposited with the defendants for a purpose which had never been carried out, he became entitled to recover it as money received to his use, whether it is placed on the ground of a failure of consideration or that it was obtained through an imposition practiced upon the plaintiff, the defendants having deliberately made a statement to the plaintiff in reference to his stock, and the loan upon it, which they knew to be false.

I think the appeal should be dismissed, and the judgment of the Common Pleas Division affirmed.

PATTERSON, J. A.—The plaintiff, desiring to speculate in Federal Bank Stock by purchasing stock and holding it in hopes of a rise in its selling value, arranged with a broker named Farley to carry for him 500 shares of that stock. He had 200 shares transferred by other brokers, Hope & Millar, to Farley, and Farley was to buy, and represented that he had bought, 300 other shares, making the 500.

The course of business is explained to be that the employer pays the broker a margin of ten per cent. on the market value of the stock, and the broker provides the other 90 per cent., holding the stock as his security. The broker is at liberty to require his employer, at any time, to take delivery of the stock and pay the advances, in default in doing which he may sell the stock; and the employer may at any time require the broker to sell, the employer being always liable, in case the stock falls in value, to pay more money as margin or to have the stock peremptorily sold.

The plaintiff was going to Europe in April 1883, and his arrangements, particularly the taking over by Farley of the 200 shares from Hope & Millar, were made with a view to his absence.

He had to provide for keeping up his margin if called upon, and that he did by arranging with an agent to pay the money. He had also to provide against the contingency of being called on to take delivery, and he adopted a suggestion of Farley to obtain "a time loan" upon the 500 shares.

A time loan I understand may be either made by the broker himself or procured by him from some one else, the effect in either case being that the money recoups the broker's advance, and the employer cannot be called on to take delivery until the loan matures, though he may sell earlier if he pleases, and his liability to keep up his margin or, in default, to have his stock sold continues.

The plaintiff says that Farley represented to him that he had effected a time loan till the first of December at eight per cent. with Mr. Moat a Montreal broker.

Farley denies this, asserting that all he told the plaintiff was that he would carry the 500 shares till December at eight per cent. But there can be no hesitation in accepting the plaintiff's statement, as will be evident when we see more of the evidence and especially the evidence supplied by the defendant Cox.

Another question between the plaintiff and Farley upon



their evidence is whether Farley gave the plaintiff to understand that the interest on the loan would stop whenever the loan was paid off, or whether the interest was to be payable till December in any event. The fact itself is of consequence only incidentally if at all, and the dispute need not, perhaps, have been mentioned except in order to make some of the evidence more intelligible.

Farley did not effect the time loan with Moat.

It is also more than doubtful whether he ever had any of the 500 shares which the plaintiff supposed him to hold on his account. The evidence does not shew distinctly whether he had any shares transferred from Hope & Millar. They transferred to him the margin on 200 shares which they had from the plaintiff, but whether they ever had the shares which the plaintiff supposed they had bought on his account at about 161 is not clearly explained, nor is it, as I apprehend, very material. There is, I think, no pretence that Farley bought any part of the 300 shares which the plaintiff was led to understand had been bought in small lots at from 152 and 153 to 160.

The time loan transaction was obviously entered into on the representation by Farley, and the belief by the plaintiff, that Farley was carrying or had pledged to Moat 500 shares on the plaintiff's account.

The margin deposited with Hope & Millar and with Farley was, as the plaintiff says about \$6.600.

What I have so far stated is only introductory to the plaintiff's dealings with the defendants to which I now pass on.

In July, 1883, Farley being about to close his business, the defendants arranged to take over the transactions he had on hand, and the plaintiff's agents consented, and even urged, that they should take over the transaction in which he was interested.

The defendant Cox shews that in arranging with Farley each transaction was treated and settled by itself.

These settlements were made between the 12th and 24th of July, that respecting the plaintiff's matter being on the 18th, or 19th, the entries being made as of the 19th.

Farley had no stock to hand over, and the defendants had no stock to sell him ; but it was arranged that the defendants should debit Farley with 500 shares at  $158\frac{1}{2}$  or \$79,250, which was done, and he was credited with \$75,807.54 as the amount due by the plaintiff, leaving \$3,442.46 to be paid over by Farley. He did pay by his cheque \$3,000 which we find credited him in the account. Three of the credits on the 19th July are, "Interest on 500 Federal \$1,129.85 ; cheque \$3,000 ; and 500 Federal R. W. S. \$75,807.54." The first and last are clearly on this affair, and we may safely assume that the cheque was for part of the margin of \$3,442.46. But there is a credit of \$1,000 cash on the 20th, and the result of the whole account is to shew a balance in favor of Farley of nearly \$5,000 ; therefore we need not hesitate to adopt the view acted on in the court below that the whole \$3,442.46 was paid over to the defendants.

The item of \$1,129.85 deserves some notice.

Cox puts it beyond doubt that no such thing as a time loan from Moat was in any way involved in this settlement. He says, I believe, that Moat's name was not mentioned, but that will be found hard to believe in view of what has to be mentioned by and bye. At the settlement he and Farley knew and dealt on the knowledge that there was a nominal time loan on which the plaintiff was to be charged interest, but that neither had Farley advanced, nor were the defendants to advance, a dollar, and they agreed between themselves that half the interest should go to Farley and half to the defendants. The credit of \$1,129, 85 is for Farley's half of this interest computed up to December.

This part of the settlement concerns us only as putting in a strong light the fictitious character of the dealing with the plaintiff and the recognition of its being of that character by these brokers when they made the settlement.

The substantial fact, so far as this action is concerned, is the payment by Farley to the defendants of \$3,442.46 as money belonging to the plaintiff and on deposit as margin on the supposed 500 shares of stock.

That sum is what the plaintiff now seeks to recover from the defendants as money received to his use.

The demand is resisted on the ground that the transaction as commenced by Farley, and as assumed by the defendants, was not only a legitimate and real transaction, but was what they were employed by the plaintiff to do; that in short, what he paid his margin for and agreed to pay eight per cent. on some \$75,000 for, was not 500 shares of Federal Bank stock, nor any stock whatever, but simply for the personal and unsecured undertaking of Farley first and the defendants afterwards, that whenever he required them to do so they would procure 500 shares of that stock and sell it on his account; or that without going through the form of a purchase and sale, they would account with him on the basis of the market price of the stock on that day.

The opposition under such a system between the interest of the broker and that of his employer is obvious, the latter employing the broker to act for him as a bull, while the broker's whole interest is that of a bear. I borrow these terms of art from Mr. Farley's evidence.

If it had been attempted to prove that there was a custom by which such a mode of dealing was sanctioned, this opposition of interests would furnish a formidable argument against the reasonableness of the custom, *Robinson v. Mollett*, L. R. 7 H. L. 802. There is, however, no proof of any such custom, and setting aside the plaintiff's evidence on the subject of what his understanding was, the evidence supplied by the defendant Cox is conclusive that he did not receive the money in the belief that the plaintiff had dealt with Farley on any such terms, and that in his own communications with the plaintiff, Cox did not assume to deal on any such terms, and was fully aware that the plaintiff had no idea of so dealing.

The incident of the time loan cannot be reconciled with the assumption that the plaintiff was dealing or was given to understand that he dealt either with Farley or the defendants on their personal undertaking to procure stock

at a future time. It is consistent only with the understanding that they held and were carrying the stock for him.

Now for the purpose of testing the plaintiff's right to recover the \$3,442.46 as money received to his use and held by the defendants without consideration, let us look at the evidence supplied by Cox, principally by his correspondence, and we shall see how entirely fictitious the ostensible dealing was on the part of the defendants while the plaintiff was led to believe and did believe it to be real.

We take first the defendants' letter of the 20th of July, 1883, to Mr. Blackstock, a solicitor who had acted on behalf of the plaintiff in connection with the transfer from Farley.

DEAR SIR,—We have received from Messrs. W. W. Farley & Co., five hundred shares Federal Bank, account R. W. Sutherland, and paid them \$75,807.54, on which we charge interest at 8 per cent. until December first, as per arrangement.

Yours very truly,

COX & WORTS.

Then on the 23rd July Mr. Clarkson, who had a power of attorney to act for the plaintiff in his absence, wrote to the defendants :

DEAR SIRS,

I am representing Mr. Sutherland during his absence in Europe, and would like if the Federal Bank stock received by you from Farley was carried for less than 8 per cent.

Have I the option of changing the loan if I wish? Kindly let me know.

Yours truly,

E. R. C. CLARKSON.

And on the next day the defendants replied :

DEAR SIR,

In reply to your favour of yesterday, the Sutherland Federal Loan cannot be changed without payment of interest to 1st December, at 8 per cent.

We regret this, but understand the terms are the same as agreed upon between Mr. Farley and Mr. Sutherland.

Yours very truly,

COX & WORTS.

In August the plaintiff had returned to Toronto. On the 9th of that month he wrote to the defendant Cox :



MY DEAR COX,

Please make me out a statement of my account re Federal Stock et al. as transferred over by Farley & Co. Also to 1st August. You got out this a. m. before I could thank you for your attention to my interests. May you live forever.

Faithfully yours,

ROB. SUTHERLAND.

And on the following day received this reply :

MY DEAR BOB,

We took over your 500 Federal from Farley, on 19th July, paying him \$75,807.54, and assuming his loan on same at 8 per cent. until first December. Am going to N. Y. to-day. Back on Tuesday.

Yours very truly,

E. STRACHAN COX.

Then having been told by some one that the defendants had not received any stock from Farley, he saw Farley, and afterwards saw Cox. This is his account of the interview :

"I took him by the shoulder and told him to tell me, as a friend, if he had the stock ; and he said he had—it was under loan to Mr. Moat, of Montreal. He said, if you do sell it, you will have to be charged interest up to the first December. I said he could not do it ; it was not usual ; that was not my arrangement with Farley ; he said he had nothing to do with that—that was his arrangement with Farley. I then asked him about the stock—what he thought about it. Q. What next ? A. On questioning him, he advised me to hold the stock ; I would make money on it if I did. Q. What did you say further to him about selling the stock ? A. That was about the pith of the conversation ; I said I had made up my mind to sell the stock at the present price—161 or 161 $\frac{1}{4}$ ."

The account given by Cox, which I shall read, is not substantially different.

"Q. Now, do you remember Sutherland coming to you one day, and asking whether you really had his stock or not—putting you on your honour to tell him ? A. No, he did not do that. He says 'no fooling, Cox.' Q. 'No fooling, Cox—have you got my stock ?' A. Yes ; that is the interview he referred to. Q. Well he was putting you on your honour in a sort of way—I am not saying it would make you any higher to stand on it ? A. Certainly not. Q. Well, what did you answer him ? A. I told him we

were 'long' on the stock with Moat. Q. Didn't you tell him you had that stock deposited with Moat? A. I did not say that we had his stock deposited with Moat. Q. Didn't you give him to understand his stock was subject to a loan in favor of Moat? A. I don't know what he understood, but I told him we had stock with Moat to the extent of 600 or 700 shares—we were 'long' with Moat. Q. Now, he came there for the purpose of satisfying himself that the stock was in existence? A. Did he? Q. Didn't he? He said, 'now, no fooling?' A. He came to tell me the story told to him. Q. And the stories convinced him that you had no stock? A. It convinced him further I was 'short.' Q. His interview with you was for the purpose of seeing whether the stock was there or not? A. Yes; I told him about Moat. Q. You did all you could to satisfy him? A. I answered all his questions. Q. Now, you had always refused to give him an account of the Moat loan and the transaction, had you not? A. Yes; I had no Moat loan to give him. Q. And you did not tell him so? A. No."

We are not concerned with the transactions between Moat and the defendants, but it may be noticed that if Cox did tell the plaintiff at this interview that he had 600 or 700 shares of Federal stock with Moat, he told him what is not borne out by Moat's evidence, which seems to shew that while the defendants had some stock pledged with him it was at this time under 500 shares. Even 600 or 700 shares would not go far towards the 3,500 which Cox tells us they were 'short' in this stock.

The next correspondence was occasioned by a demand by the defendants for over \$2,000 on their representation that they had sold the plaintiff's stock.

It seems they had written on the 12th of October, 1883, a letter which the plaintiff did not receive calling for \$2,000 additional margin, and had then pretended to sell his stock. This proceeding consisted of an arrangement between Cox and another broker that the latter should bid at the exchange for 500 shares which Cox should offer for sale. This was done, the whole thing being a fiction: the one had no shares to sell, and the other was carrying out his part of the conspiracy by going through the form

of buying. Cox says it was a genuine sale. He explains what he means in answer to the question "A genuine sale of a myth?" "Yes," he replied, "because I happened to be the purchaser."

The plaintiff was at that time in Winnipeg. After one or two telegrams Cox wrote to him on the 16th of October:

DEAR SIR,

As wired you, we sold your 500 Federal at 150 $\frac{1}{4}$ —contract enclosed. This leaves you in our debt, charging interest only to date, \$2,286.16, which you will doubtless arrange on your return.

There has been no improvement to-day in the financial situation, and Federal to-night sold at 147 $\frac{1}{4}$ .

No living mortal expected this drop, but it has come—and the result will be, in our opinion, that for some time to come no rise of any moment will take place. There is no "short" interest. The street is full of the stock, and the financial outlook generally is most discouraging.

Yours very truly,

Cox & Worts.

On the 31st October, the plaintiff again being in Toronto wrote to the defendants:

GENTLEMEN,

Your favour of the 15th inst., directed to Winnipeg, with notices of sale of 500 shares Federal stock on my account reached me yesterday.

Will you procure for me, from Mr. R. Moat, of Montreal, a full and detailed statement of the loan made through him by Farley and Co. last April on my 500 shares, and the conditions attached thereto, and oblige,

Yours truly,

R. W. SUTHERLAND.

And the defendants replied the following day:

DEAR SIR,

In reply to your letter of yesterday, would it not be better for you to ask Mr. Farley to obtain any statement or information you may require as to his loans with Mr. Moat? The latter is scarcely likely to give us any information as to his transactions with Mr. Farley.

Yours very truly

Cox & Worts.

The defendants wrote on the 5th of November pressing for payment of the balance they claimed, to which the plaintiff thus replied on the 6th:

GENTLEMEN,

Your favour of date just received. Before doing anything further in the matter of which you write about, I would be pleased to get what I am justly entitled to—a statement of Mr. Moat's showing the loan he made on my 500 shares, through Farley & Co. ; also, a statement from him from the time your firm assumed said loan, until the date of the sale of said stock.

Waiting answer, I am yours faithfully,

R. W. SUTHERLAND.

The next letter is one from the defendants dated 16th of November :

DEAR SIR.

We enclose statement of your account and must ask you to arrange the balance at your debit without delay. Referring to yours of 6th, we do not propose to disclose to you or any one else our transactions and dealings with Mr. Moat or any other client ; and it is, of course, impossible for us to give you statements of your transactions with Farley & Co.

Yours very truly,

COX & WORTS.

A statement of account dated the 15th of November, 1883, was rendered to the plaintiff :

TORONTO, 15th November 1883.

|  |             |
|--|-------------|
| July 19—500 Federal F. & Co.....         | \$75,807 54 |
| Interest 8 per cent. to 1st December.... | 2,226 24    |
|  | <hr/>       |
|  | \$78,033 78 |

CR.

|                               |             |
|-------------------------------|-------------|
| October 16th—500 Federal..... | \$75,000 00 |
| Balance.....                  | 3,033 78    |
|                               | <hr/>       |
|                               | \$78,033 78 |

October 16th—Balance, \$3,033 78.

The credit of \$75,000 is produced, as shewn by a statement of 15th October, by the price bid at the sham sale, viz. :

|                     |          |
|---------------------|----------|
| 500 shares at 150¼= | \$75,125 |
| Less brokerage      | 125      |
|                     | <hr/>    |
|                     | \$75,000 |

On the 24th November Cox wrote to the plaintiff :

DEAR BOB.

Come in and arrange your debit balance. We can make things pleasant if there be not too much delay.

Yours truly,

E. S. Cox.



The plaintiff replied on the 26th :

Mr. E. S. COX, City.

DEAR SIR,

Your letter of 24th before me. I intend seeing you in the course of a few days in reference to your statement as rendered. Before arranging with you, I must be convinced that you carried my stock with Moat, and that it was my stock you sold on 15th October last. Absolute proof of this is necessary, and can be given by you, if you so desire. If not, why ?

I am, yours faithfully,

R. W. SUTHERLAND.

And the correspondence between the parties closed with Cox's letter of the 10th December :

Toronto, 10th December, 1883.

DEAR SUTHERLAND,

I don't know that your last letter to me required an answer, as I had already declined the request—and in your case the exceedingly unreasonable request—contained in it. We have treated the sufferers in the Federal deal with a consideration and leniency which had the tables been reversed would not have been accorded to us by either you or them. You can, under the *Baby Act* probably escape the legal responsibility, but not the moral one, of your indebtedness to us, and though a suit may not bring us our money, it will at least close the mouths of your over zealous friends, who so industriously circulate a version of our dealings with you which is anything but truthful ; and it is possible also that in this way you may gain all the information, and perhaps more than you now ask from us.

Yours very truly,

E. STRACHAN COX.

It is true, as Mr. Lash put it, that a man may tell a great many lies without incurring a legal liability, and one may have to regret that dealings so redolent of falsehood and fraud should go unpunished ; but those considerations are apart from the use now to be made of the evidence to which I have referred in perhaps unnecessary detail. What is here shewn is the receipt on the 19th of July, 1883 to the use of the plaintiff of \$3,442.46 for a purpose which was in no respect fulfilled.

The purpose was to be as margin on stock to be held by the defendants or Mr. Moat, subject to the order of the plaintiff. It was not for any purpose which depended on the solvency of the defendants, or their personal obligation, and that it was so understood by the defendants is manifest from all the correspondence, which admits the plain-

tiff's version of their dealings, when a prompt denial would undoubtedly have been the answer if he had misstated them.

There is really no further matter of law involved in the case. It may be that a broker is not to be expected to ear-mark the stock held for each employer, but may satisfy his obligation by always being able to control a sufficient amount of any particular stock to cover all his liabilities. This appears, from cases cited to us, to have been so held in the courts of a number of the neighbouring States, but not in all.

But in all these cases the transactions were real, and nothing like what the defendants avow to be their usual practice. It was so even in *Wynkoop v. Seal*, 64 Pa. 361, where it happened that at one time the broker had parted with so much of the stock that if he had been called upon by his employer he might not have been able to respond without buying stock. He had bought 600 shares of stock for his employer, and had held it or an equivalent amount of the same stock for a long time, and at last called on his employer to take delivery, and on his refusal sued for his advances, producing in Court scrip for the 600 shares. The point decided was that it was not error to refuse to tell the jury that the plaintiff could not recover because for a short interval he had not had the stock, though he deposed that he could have then, as well as at the other times have fulfilled his obligation if he had been called upon.

That case is as far as the others from sanctioning the system on which the defendants by their own avowal carry on their business.

The plaintiff has, with his reasons against the appeal, given notice, by way of cross-appeal, of a claim for damages for deceit with which he charges the defendants on the occasion to which I have referred, when he asked the defendant Cox if he had the stock and was given to understand that he had it pledged to Moat.

The plaintiff alleges that his intention at that time was to sell, but that he was prevented by the untrue and dis-

honest assurances by Cox. The defendants answer that Cox at that time merely advised him not to sell, and that the plaintiff acted on the advice given. It is unnecessary to discuss the matters on which the decision of the dispute might turn, because the claim has not been pressed before us, and could not well be maintained consistently with the grounds on which we hold the plaintiff entitled to recover for money received to his use.

The appeal must be dismissed with costs.

OSLER, J. A.—Farley had the plaintiff's margin on 500 shares of Federal Bank stock which the latter supposed Farley had bought or was holding for him, and the plaintiff was also told by Farley that he had pledged these shares as security for a loan thereon with one Moat, at 8 per cent. interest, payable on the 1st of December.

Farley under these circumstances, transferred his business to the defendants, paying them the margin he had received from the plaintiff, the plaintiff taking the defendants as his brokers and holders of his shares subject to the supposed loan.

Mr. Lash argued that the plaintiff was bound to adopt or repudiate the arrangement between Farley, the defendants and himself as a whole; and I agree that he was bound to do so, if and so far as it was real and founded on facts disclosed to him. The defendants took over his margin and his supposed shares subject to Farley's pledge, and the plaintiff subsequently dealt with them as in all respects standing in Farley's shoes. But the plaintiff's margin was the only thing that was real. There were no shares, and of course no pledge of them by Farley, and no loan upon them by Moat; and this Farley and Cox knew, though the plaintiff did not. Therefore, as between all parties the defendants have the plaintiff's money, while between Farley and the defendants everything else was a sham, except that they divided between them a sum which they meant to make the plaintiff pay upon a loan that was never made. I cannot say that I have seen anything in the evidence which

induces me to believe that the plaintiff would have accepted Farley's or Cox's personal responsibility instead of the shares themselves, or that he was gambling in differences represented by book-keeping, instead of speculating in real shares. To me the evidence is convincing that he believed, and Farley and defendants allowed him to believe, that they had his shares, and there is not a shred of evidence in the case of the existence of a custom, (assuming for the moment that such a custom would be sustainable in law), which authorises a broker to deal with shares pledged to him, by selling them out and out previous to default, being only liable to replace them (if he can) when called upon to do so, or which authorizes him, when instructed to purchase shares to do so by book-keeping only, without actually buying them.

I think the plaintiff is clearly entitled to recover this money from the defendants, as money had and received by them to his use. The cross-appeal was abandoned on the argument, except in so far as the grounds on which it is based were urged in support of the judgment already given. I think that the judgment is right, and should be affirmed for the reasons therein given.

FERGUSON, J., concurred.

*Appeal dismissed with costs.*

[Affirmed by the Supreme Court.]

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## CLAYTON V. MCCONNELL.

*Contract to build—Rescission or abandonment of contract—Counter-claim—Damages.*

The defendant had agreed with the plaintiffs for the erection by them of a house on his land ; and while engaged in such work the plaintiffs alleged unnecessary delays in their operations caused, as they said, by the neglect of the defendant in supplying material for the building and in the course of a discussion the defendant told the plaintiffs " If you won't go on with your work, go away."

*Held*, that this did not amount to a rescinding of the agreement, and that plaintiffs were not warranted in treating the agreement as abandoned by the defendant, who was entitled to counter-claim against the plaintiffs for the increased cost to him of finishing the building.

*Midland R. W. Co. v. Ontario Rolling Mills Co.*, 10 A. R. 677, followed. Decision of GALT, J., 14 O. R. 608, reversed.

THIS was an action brought by Robert Clayton and John Miles to recover a balance alleged to be due to them by the defendant under a written contract for the erection of a building on defendant's land. The defendant alleged that the plaintiffs had abandoned their work under the contract, and that he had been obliged to finish the same at a largely increased cost.

When the case came on for trial it was referred, by consent, to an official referee, to take the accounts and find upon the facts in dispute between the parties. After hearing evidence, that officer found that the plaintiffs were justified in abandoning the work, and were in fact dismissed by the defendant, and that they were entitled to be paid by the defendant the balance which would be payable to them under the contract had they not abandoned the work, and had the defendant not been obliged, at an additional expense, to have the work completed by others.

The defendant appealed from the report on the grounds that the referee should not have found that the sum of \$80.76 was due from the defendant to the plaintiffs, and should not have found that the plaintiffs were justified in leaving the work before completing the same, because under the law and the evidence and the other findings of the said referee, the plaintiffs were not justified in leaving the work, and no sum other than the sum of \$1.81 was

therefore payable by the defendant to them, and because the referee should have held that the defendant was entitled to damages upon his counter-claim, and should have inquired into the same, whereby the balance of \$80.76, if payable at all, would have been reduced or extinguished.

Upon the argument of the appeal an order was asked for referring it back to the referee to amend his said report, and to proceed with the defendant's counter-claim, or for such other order as might seem just.

The appeal was heard before Galt, J., on the 29th June, 1887, who, after hearing counsel for all parties, dismissed the appeal, with costs.

The learned Judge, in the course of his judgment (14 O. R. 608), remarked :

“This appeal is against the 4th and 5th findings. The 4th has reference to the question of amount now due to the plaintiffs and need not in the view which I take of the 5th be considered. The 5th finding is as follows: 5. ‘I find that the plaintiffs left the said work before completing the same, and were justified in doing so for the following reasons namely; the defendant refused to pay them the full amount due according to the terms of the contract and caused the plaintiffs delay in not having the joists ready at the proper time for their use and when asked for more money he finally told them to go on with their work or if they would not go on to leave the building.’ The learned referee in his judgment held that this justified the plaintiffs in considering the contract at an end, and entitled them to receive any balance that might be due to them. Lash contended that this was an erroneous finding and therefore the defendant was entitled to counter claim against the plaintiffs; he relied on the case of *Mersey Steel and Iron Company v. Naylor*, 9 Q. B. D. 648, and same case in 9 App. Cas. 434, to shew that the mere refusal to pay the amount claimed by the plaintiffs was not such an act as would justify the plaintiffs in refusing to proceed with their contract. \* \* \* Now in the present case it is true the defendant did not in express terms forbid the plaintiffs proceeding with the work, but he did by the expression used by him leave it optional with the plaintiffs to proceed with or abandon the work; they accepted the option and therefore I am of opinion the learned referee was right when he found the plaintiffs were justified in considering the contract at an end.” \* \* \*

The defendant thereupon appealed to this Court and the appeal came on for hearing on the 16th day of May, 1888.\*

\* Present—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

*Lash*, Q. C., for the appellant. The defendant here is not shewn to have said or done anything that could be considered as evidencing an intention on his part to abandon the contract or refusal to perform it; on the contrary the facts and circumstances set forth in the evidence shew the defendant's desire to have the contract carried out and the work agreed for completed; consequently he is entitled to recover damages to such an amount as he can shew he has been injured by reason of the plaintiffs' refusal to complete the work. This view is fully borne out by the *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648; affirmed 9 App. Cas. 434.

The defendant was fully justified in telling the plaintiffs to leave the building unless they proceeded with the work; this did not give them such an option as would relieve them from liability.

*J. R. Roaf*, for respondents, referred to *Lilly v. Elwin*, 11 Q. B. at 755; *Planch v. Colbourn*, 8 Bing. 14. *Smith* on Master and Servant, 4th ed. 188, 196; *Wood* on Master and Servant 2nd ed., p. 298; *Addison* on Contracts, 11th ed., 523; contending that the language shewn to have been used by the defendant to the plaintiffs was a clear abandonment of the contract and a refusal to perform it on his part.

June 29, 1888. OSLER, J. A.—The only question is, whether the referee should have proceeded to try the defendant's counter-claim. This he ought to have done, unless it appeared that the defendant had so acted as to absolve the plaintiffs from performance of their agreement.

The question is the same as that which was so much discussed in *The Mersey Steel Co. v. Naylor*, 9 Q. B. D. 646; 9 App. Cas. 434, and more recently in this Court in *Midland R. W. Co. v. Ontario Rolling Mills Co.*, 10 A. R. 677.

It is a question of fact upon the evidence; as Lord Selborne expresses it in the former case :

“ You must look at the actual circumstances of the case in order to see whether the one party to the contract is

relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation—to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.”

Elsewhere he says :

“One party may have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion ?”

By the contract the plaintiffs were (1) to do the masonry and brickwork of the defendant's building under defendant's supervision (2) in first class order and condition, (3) at the rate (weather permitting) of not less than 10,000 bricks, and as many more as possible, each and every day from date till the job was completed. (4) The defendant to place the material on or around the premises where the building was to be erected. (5) The price to be paid to be at the rate of \$4.00 per M. kiln count, and the stone work at the same rate per mason's toise ; payment to be made at the end of every two weeks, less one-eighth which was to be paid at the end of the job.

From the evidence it appears that the plaintiffs worked upon the building until Saturday, 21st August. Up to the 15th August, no difficulty had arisen. Between that time and the 21st August, some delay and inconvenience was caused by defendant's default, which is not shewn to have been wilful or intentional, in not having the joists in position when the plaintiffs were ready for them, but the absence of the joists at that particular stage did not necessitate the stoppage of the work, though it prevented the plaintiffs from proceeding with it as expeditiously as they could otherwise have done, and with as large a staff of laborers. As the plaintiff Miles expressed it, they worked along for the week with fewer hands and at a disadvantage.

On the 21st, when the plaintiffs came to be paid for the previous fortnight's work, a dispute arose, in which, as



might be expected, both parties were in the wrong, as to the amount due. The defendant paid the plaintiffs what he believed they were entitled to receive, and they claimed a much larger sum. In point of fact, as it afterwards turned out, the defendant then owed the plaintiffs \$18.27 more than he paid them, while on the other hand they were demanding a much larger sum than was due to them, claiming to have laid upwards of 21 M. more bricks than the referee subsequently found they had laid.

On the 23rd the plaintiffs re-appeared at the building, but refused to proceed with the work, alleging that they could not lay the 10,000 brick per day; the whole of the joists not being then in position, though on the ground and ready to be put in.

The defendant urged them to go on with the work telling them if they would not do so, to go away; upon which they went away.

The whole of the evidence for the plaintiffs in support of the fifth finding of the referee above set out, may be said to be summarized in that of their witness, Samuel Trotter:

Q. Did you hear McConnell say anything about the joists? A. McConnell said to work on as long as they could, and if they were delayed he would pay their time.

Q. Were you delayed at all for want of these? A. We could not work to a good advantage.

Q. Did you ever lose more than a few hours at a time? A. Yes, one day; I don't know that it was on account of that, some holiday, and the next day we could not work.

Q. Did you hear anything that took place between Clayton, Miles, and McConnell on the last day? A. Something; they did not get the amount of money they should have got according to the number of bricks.

Q. What did you hear McConnell say about the matter? A. He said they had all that they had laid; that he had given them as much as they had laid.

Q. Did you hear him say anything about their going on with the work? A. He said for them to "go on," or "get to hell out of there," or something to that effect.

Q. When was this that he told them "to get out of there"? A. That was the last day [the 23rd August], that is if they did not go on and finish it with what they got without giving them any more money.

Q. Where the joists all there at that time? A. Well, I don't know whether they were there, but they were not up, and that amounts to the same thing.

Q. You were unable to go on with the work? A. As I said not to advantage.

From this evidence the learned referee appears to have held that the plaintiffs were justified in abandoning their contract, on the ground (1) of the defendant's refusal to pay the amount which would now seem to have been actually due (2) the delay caused by his not having the joists ready at the proper time, and (3) that the defendant offered them an option either to go on with the work or to leave it, and they were therefore at liberty to leave it.

I am unable to agree with this conclusion. The evidence in support of the 1st and 2nd grounds appears to me wholly insufficient to warrant the inference that the defendant meant to repudiate the contract, or to hold himself no longer bound by it. On the contrary, he evidently wished it to go on, and to have the work done under it as quickly as possible, offering, if the plaintiffs were delayed, to pay for their time. The delay in putting in the joists, though it may have given the plaintiffs some claim to compensation for loss of time, had not actually prevented them from working, and seems to have been caused not by any unwillingness on defendant's part to expedite the work, but from a difficulty in procuring the necessary timber. All cause for complaint on this score, besides, had been practically removed at the time the plaintiffs left the work on the 23rd August.

Then as to the non-payment. I think it is impossible to hold that this was, under the circumstances, a matter going to the root of the contract. It is not suggested that the defendant was either unable or unwilling to pay all that was really due according to the contract, as he understood it. There was simply a mistake, in good faith so far as appears, on both sides, the plaintiffs asking for more, and the defendant offering to pay less, than it has since been found, was due. Even if the mistake was the

defendant's alone, caused by the way in which he had measured the stone work, supposing as he did, that the *mason's* toise was the same as the *wharf* toise, that affords no foundation for the suggestion that he did not intend to be bound by the contract. There may have been a breach of the contract by the defendant, but that is not enough. Taking the test to be that stated by Bowen, L. J., in 9 Q. B. D. 670, I fail to see any evidence whatever that his conduct was inconsistent with an intention to be bound any longer by the contract.

The plaintiffs, then, not being justified in abandoning their contract by reason of anything that had occurred up to the 23rd August, it appears to me that what the defendant said to them on that day, as to going on with their work, or leaving the building, cannot be seriously treated as offering the plaintiffs the alternative of rescinding their contract if they did not choose to go on with the work. They were then in the wrong—they were refusing to work. If they were not working, and did not intend to work, they had no business there, and were merely obstructing the defendant. It was therefore a most natural thing for him to say: "If you won't go on with your work, go away." The plaintiffs admit that the defendant told them he would put men on (to finish the work), the defendant adding that he also said he would charge them (the plaintiffs.)

It is to my mind a very forced construction of the language (whatever it was) which he employed on this occasion to hold that he thereby gave the plaintiffs an option to put an end to the contract.

I am, therefore, of opinion that the appeal should be allowed, and the case sent back to the referee to dispose of the counter-claim. In doing so he is to make the plaintiffs such reasonable allowance as may seem proper against anything which the defendant may recover on the counter-claim for any loss of time and delay caused by the joists not having been put on at the proper time.

HAGARTY C.J.O., BURTON and PATTERSON JJ.A., concurred.

*Appeal allowed with costs.*

## ST. VINCENT V. GREENFIELD.

*Way—By-law to establish highway—Boundaries—Statute labour—Expropriation—Injunction—Obstruction.*

It is essential to the validity of a by-law to expropriate land for the purpose of establishing and laying out a highway, that the course, boundary, and width of such highway should be capable of being ascertained from the by-law itself or from some document or description referred to by it, which may be treated as incorporated therewith; failing this the by-law is necessarily inoperative and void.

In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs: and where the road in question, the land for which had not been expropriated, was described as being "A road on the boundary between the 11th and 12th concessions of the said township from the line between lot No. 30 and lot No. 31, to the line between lot No. 35 and lot No. 36," no survey or other description of the road being referred to in the by-law passed for the purpose of opening up the same, and no sufficient evidence having been given of the performance of statute labour on the line of road, it was

*Held*, [affirming the judgment of the C. P. D. 12 O. R. 297] that the plaintiffs had failed in shewing that the road as claimed by them had been duly established as a public highway.

*Semble*, the land for a road not having been expropriated the mere expenditure of public money in opening it and the performance of statute labor upon it does not make it a highway.

An action for an injunction may be maintained by a municipality to restrain the obstruction of a highway. They are not confined to the remedy by indictment; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4, approved of.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 12 O. R. 297, and came on for hearing before this Court on the 6th of April, 1887.\*

*Creasor*, Q. C., for the appellants.

*Frost*, for the respondent.

The facts are fully stated in the report of the case in the Court below.

June 29, 1887. The judgment of the Court was delivered by

\* *Present*:—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A



OSLER, J. A.—In this case the plaintiffs, a municipal corporation, claim an injunction restraining the defendant from continuing to obstruct an alleged public highway on the blind line between the 11th and 12th concessions of the township.

There does not appear to be any objection to their maintaining a civil action for this purpose instead of proceeding by indictment, though the latter is the more usual course. The cases on the subject are collected in *Village of Fenelon Falls v. The Victoria R. W. Co*, 29 Gr. 4.

The defendant's case is, that the obstruction of which the plaintiffs complain is the fence erected by him along the western extremity of his land, viz., the north half of lot 32 and the south half of lot 33 in the 12th concession of St. Vincent, and he denies that any highway has been legally laid out or established thereon.

The onus of proving the existence of such a highway rests of course upon the plaintiffs, who have, in my opinion, for the reasons assigned in the judgment of the learned Chief Justice in the Court below, entirely failed to maintain it.

They rely in the first place upon a by-law passed by them on the 26th November, 1864, by which it was enacted that two roads as described therein, should be, and were thereby established permanent highways of the township. One of these roads is the road in question, and is thus described :

“2nd. A road on the boundary line between the 11th and 12th concessions in the said township from the line between lot No. 30 and lot No. 31, to the line between lot No. 35 and lot No. 36.”

There is no reference in the by-law to any survey or other description of the road, or even to the petition in compliance with which it is said to have been introduced, and which merely states that a line of road “established between the 11th and 12th concessions from the side road, 30 and 31 to 36, where said line is already established, would greatly accommodate the petitioner.”

There is nothing to connect the petitions with the by-law, but if the two documents can be read together, it would be a mere matter of conjecture that the proposed road was to be a continuation of, and the same width as the other, laid out to an equal distance on each side of the boundary line between the 11th and 12th concessions, which is a blind line, there being no original allowance for road in rear of the lots fronting on those concessions.

According to all the cases which have been decided in our Courts on the subject, from the earliest to the present time, it is essential to the validity of a by-law by which a corporation professes to expropriate land for, and to establish and lay out a highway, that the course, boundary, and width of such highway should be capable of being ascertained either from the by-law itself or from some document or description referred to by it which may be treated as incorporated therewith. Failing this the by-law is necessarily inoperative and void, since, merely as regards the width of the road, it cannot be seen whether it was to be of the maximum or minimum width prescribed by the Act, or of some width intermediate between the two.

In *Regina v. Sanderson*, 3 O. S. 103, it was held that a highway could not be legally established by the Quarter Sessions under the 50 Geo. III., ch. 1, where the report of the surveyor to the magistrates did not express the exact width of the road and the course it was to run.

Robinson, C. J., p. 111, said :

“It is, I think, fatal that the report, considering the plan, though not annexed, to be part of it, gives merely a mathematical line by courses and distances, and says neither on which side the road is to be nor what is to be its width.”

And in *Regina v. Rankin*, 16 U. C. R. 304, the same learned Chief Justice said : “We have determined in other cases that the by-law to be passed for laying out new roads must be so framed as to make it clear what the precise course of the road is to be, and what space of ground it is to occupy.” Other cases, which are referred to in the judgment below, lay down the same rule, and see also *Thompson v. Bedford*, 21 U. C. R. 545, where the by-law

was quashed because it did not sufficiently define the line of the road.

Failing to prove a road legally established under a valid by-law, the plaintiffs fall back upon the section of the Municipal Act which defines highways, and declares that, *inter alia*, any *roads* whereon the public money has been expended *for opening the same*, or whereon the statute labour has been usually performed, shall be deemed common and public highways; and they contend that this road up to the full width of half a chain on each side of the blind line has, by the expenditure of public money in opening it, and by the performance of statute labour upon it for many years past, acquired the character of a common and public highway.

Now, as regards this contention, it is, to be observed that when the road in question was laid out, there was a mode provided by law, which the council did not adopt, (though they may have intended to do so) by which they could, against the will of the owner, acquire his land for the purpose of laying out a road thereon. So far, therefore, as this road was constructed on any part of the defendant's land, it is clear that if public money was expended in opening it, such expenditure was illegal and unauthorized; and if the statute labour was performed upon it, such statute labour was a mere series of acts of trespass. If, as to the land owner, the road was in its origin, (and here its origin is known,) a mere trespass road, can it become a highway within the meaning of the Act, because public money has been illegally expended in opening it, or because the statute labour has been performed upon it from year to year subsequently?

It is impossible to suppose that a highway can be created by merely expending the public money in opening out a road over lands of private individuals, unless such road is as regards them laid out and established in a lawful manner by expropriation, dedication, or otherwise. It must first be a road which may be lawfully opened. So with regard to the performance of statute labor: "Any *road* whereon

the statute labor has been usually performed." If the origin of the road is unknown it is presumed to be a highway if statute labor has been usually performed upon it. If the road has been laid out and dedicated by the landowner, the performance of statute labor upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway by the municipality, but the continued performance of statute labor upon a road which was in its inception a trespass road does not in my opinion, by force of the statute absolutely make such road a public highway. It may at most raise a presumption of dedication, or be evidence from which a dedication by the owner may be inferred, and may throw upon him the onus of rebutting such presumption or inference. I do not think it has any higher effect. Here, as I said the origin of the road is known, and as regards the defendant's land, I agree with the Court below in thinking that the circumstances rebut any inference of dedication which might be drawn from the performance of the statute labor.

In the *Queen v. Rankin*, 16 U. C. R. 304, the defendant was indicted for obstructing a highway which had been laid out in 1846, by the county council of Kent. Under the 4 and 5 Vict. ch. 10, the council could not open a new road except by by-law, and no by-law was proved. The road had however been opened by statute labor in 1846, or 1847, and much statute labor and public money had been expended upon it from that time until 1856, when the defendant obstructed it where it crossed his land. It was held that the road had not become a public highway, and that the defendant could not be convicted for obstructing it. The observations of Robinson, C. J., are in point :

" We think there could be no ground for holding that the defendant had voluntarily dedicated this land as a highway, or that it had become a highway by dedication. We see what the origin of the road was, that it was intended to be established by public authority without regard to the will of the proprietor. It has either become a road by the



authority and acts of the county council, or it is not legally a road at all.

The fact of the public using it for ten years or expending labour and money upon it between 1846 and the present time, is not sufficient to establish it as a lawful highway against the will of the owner of the soil where there is no sufficient ground for presuming a dedication."

On this point, I also refer to *Rex v. Sanderson, supra*; *Regina v. Hall*, 17 C. P. 282, and *Regina v. Great Western R. W. Co.* 32 U. C. R. 506; *Regina v. Yorkville*, 22 C. P. 431.

The cases of *Prowse v. Glenny*, 13 C. P. 560; and *Gilchrist v. Carden*, 26 C. P. 1, relied upon by the plaintiffs, are well distinguished in the judgment below from the authorities above cited.

I should be prepared to dismiss the appeal on the broad ground that, even if it had been clearly shewn that the statute labor had been performed on the defendant's land and part of the travelled way, the via trita actually laid out over it, it had not, under the circumstances, become a public highway; but it may be sufficient for the disposition of the case to say that I agree with the Court below in holding that it has not been clearly shewn that the line run by Donovan in 1864-5, was not the true dividing line, or that statute labour was in fact done, or done to any substantial extent upon any part of the alleged road as laid out by him, except the actual travelled or worn way which lies to the east of the defendant's land according to the Donovan line, and which he has not encroached upon by the erection of his fence.

*Appeal dismissed with costs.*

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## MERCHANTS BANK V. LUCAS ET AL.

*Bills of exchange and Promissory notes—Forgery—Estoppel—Ratification.*

H. Y., after having for some time carried on business as "The Hamilton Cotton Co." in partnership with the defendants, retired from the company and entered their employ as general manager, blank drafts, etc., signed by the company being placed in his hands for the financial purposes of the company. In June, 1883, H. Y., for his own purposes, drew in the name of the defendants on M. at Montreal for \$2,760, which was discounted by the plaintiffs, and the draft sent by them to Montreal for acceptance, the proceeds being first credited to defendants but subsequently to H. Y. The draft was duly honored by the drawee, and would have matured on the 28th of September. About a month before the maturing thereof H. Y. waited on the bank authorities, and requested them to recall the draft, alleging that the company were settling with the acceptor. On the same day the solicitor for the company obtained from H. Y. an order or letter addressed to the defendants, informing them of the fact of his having so used a draft made in their name, and requesting them to retire and charge the same to his account, and, as it had been discounted for his accommodation and proceeds applied to his own use, they (defendants) should not pay any part of it. Shortly afterwards the defendants, separately, on distinct occasions, called at the bank, defendant L. asking to be shewn the draft, which was handed to and closely examined by him, and when asked why he was so critical in his examination answered that the "signature of J. M. Y. was usually not so shaky"; that he would call in a day or two and see if the draft was taken up. Defendant J. M. Y. on visiting the bank after examining the draft very carefully, when he was asked by one of the officers of the institution if he would send a cheque for it, answered that it was too late that day, but that he would send a cheque the following day.

No cheque was sent, however, and on or about the 13th of September the manager of the bank and the bank solicitor called to see J. M. Y., and asked why the cheque had not been sent by him, when he admitted having promised to send the same; that at the time he had thought he would send it, and could not say why it had not been sent. He declined to say whether or not the signature to the draft was his. H. Y. subsequently left the country.

The trial Judge found that the draft was a forgery, but the judgment was reversed by the Divisional Court on the ground of estoppel by conduct on the part of the defendants.

*Held*, [reversing the judgment of the C. P. D., 13 O. R. 520], that the conduct of the defendants was not such as to preclude them from setting up the defence of forgery.

*Held*, also, that the act of forgery in this transaction not being an act professing to have been done for or under the authority of the persons sought to be charged was incapable of ratification.

HAGARTY, C. J. O., dissenting.

THIS was an appeal by the defendants from the judgment of the C. P. D., reported 13 O. R. 520, where the facts and authorities cited are fully stated.

The appeal came on to be heard before the Court on the September, 1888,\* and again in consequence of the transfer of PATTERSON, J. A., to the Supreme Court of Canada, on the 19th and 20th of November, 1888.†

*McCarthy*, Q. C., and *Bruce*, Q.C., for the appellants.

*Robinson*, Q.C., and *Martin*, Q.C., for the respondents.

January 8, 1889. HAGARTY, C.J.O.—The facts of this case are so fully stated in the judgment below that I do not deem it necessary again to repeat them.

The draft on McElderry was at Hamilton Young's request, during currency recalled by the bank from Montreal.

Then the defendants consult together as to the dealings of H. Young with the name of their firm, which had come to their ears.

He had been their partner in the cotton mill, then he retired and remained as their financial manager, trusted with blank forms of negotiable paper simply initialed by the defendant Young.

Mr. Gibbons, solicitor for the defendants, had one or more interviews with H. Young, resulting in his obtaining from him, and on his urgent request, the letter of the 25th August, addressed to the defendants :

DEAR SIRs,—I hereby request and authorize you to retire and charge to my account with your company a note made by you, endorsed by M. Wright, discounted in the Ontario Bank, Toronto, and due on or about 7th September next, for \$5,718.60, also a note made by you endorsed by said Wright, discounted in said bank, and due on or about the 7th October next, for \$5,312.18, also a draft made in your name on F. McElderry & Co., Montreal, discounted in the Merchants' Bank here, and due on the 20th [*sic*] September next.

The said notes and drafts were discounted for my accommodation, and the proceeds applied to my own use, and your company should pay no portion thereof.

HAMILTON YOUNG.

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

†*Present*.—HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.

The draft sued on is one of the three here mentioned. At that time considerable sums of the moneys of H. Young were in the hands of the defendants' firm. They have thus from him the admission that the paper specified had their name on it for his accommodation, and that defendants were to charge it in account against him.

This, I presume, must be read—whatever may have been defendants' knowledge of H. Young's conduct in other matters—as very clear evidence that they were prepared to adopt his act and to accept his authority to charge the paper against his account with them.

I do not discuss the effect of their obtaining this letter beyond its bearing upon the position that the defendants were then assuming in regard to his use of their name on this paper.

Then, on the 27th August, defendant Lucas, at the bank, saw the draft and had the conversation detailed in evidence.

Some two or three days afterwards defendant Young came and had the conversation stated promising to pay and send a cheque next day.

Lucas says he told James M. Young, after seeing the draft, that he thought it was a forgery and for him to go and see it. The latter says he knew it was a forgery when he saw it. He says he and Lucas had not consulted whether they would pay the draft or not before going to the bank, they afterwards determined not to pay.

On 13th September the manager and the solicitor, Kittson, went and shewed the draft to the defendant Young and formally asked him was that his signature. He declined to answer although pressed so to do. When asked why he had not sent the promised cheque in payment, he answered, "I don't know."

In the interval between this and the interview at the bank defendant says he was telephoned by the bank to come or send the cheque; he answered he would come up and see them. That when shewn the draft at the bank, though he knew it was a forgery, he did not tell the bank so because "I did not believe it was my business to do so at the time."



It was in evidence that H. Young remained several months in Hamilton after that, and continued in the defendants' office, apparently attending to business. He left the country in early winter without any attempt being made to arrest him.

We have heard this case argued and reargued by very eminent counsel with great ability, and extensive references to authority.

I have, with as much care as I can bestow, examined the judgments in the Court below, and have come to the conclusion that the case was rightly decided for sufficient reasons in the judgments of the late Sir M. C. Cameron, and of my brother Galt.

The dissenting judgment of my learned brother Rose states that "the onus was on the plaintiffs, that they acted on the misrepresentation, or were misled to their hurt."

The Chief Justice below deals with this :

"If it is necessary that there should be affirmative evidence of their being prejudiced by actual doing or refraining from doing, there has been no legal estoppel in this case \* \* it will be sufficient if it be shewn that in absence of the matter of estoppel the plaintiffs might have put themselves in a position from which a benefit might accrue to them. It is unimportant whether they would have taken steps to secure the benefit or not \* \* I think it must be sufficient to shew that by the intentional concealment of the truth by defendants, and their promise to pay the bill, the plaintiffs were hindered from taking proceedings which might have proved to their advantage against H. Young. They might have sued for money had and received before the maturity of the note, and this earlier right of action might have been greatly to their benefit. The defendants who by their conduct deprived the plaintiffs of the opportunity of resorting to that remedy, are not to be permitted to require the plaintiffs to prove that resort to that remedy would have been productive of gain or advantage to them."

I make these extracts as they embody my own views, and I adopt them as my own. I cannot see how we can be called on to speculate as to what, if any, steps could

have been taken by the bank from which they could have derived benefit.

As has been suggested, it is probable that they themselves had not considered or formed any determination as to what they would do, if not so misled by defendants.

I think the law does not require them to say what they would have done.

On this point I refer to some instructive remarks of Turner, L. J., in *Traill v. Baring*, 4 DeG. J. & Sm. 330. See also Lord Cranworth's language in *Smith v. Kay*, 7 H. L. Cases at p. 770.

I take it to be deducible from the authorities that in this case liability would not have attached on defendants if, after cognizance of the forgery they had simply done nothing, and said nothing, until legally called on to pay the draft. We must accept *McKenzie v. British Linen Co.*, 6 App. Cas 93, as decisive on this point.

It may also be fully conceded that any promise made or securities given, or contracted to be given on the proved consideration of a stifling of a criminal proceeding, cannot be enforced.

The law on this head fully appears in *Williams v. Bailey*, L. R. 1 H. L. 200; *Brooke v. Hook*, L. R. 6 Ex. 98.

In each of these cases the evidence shewed clearly that the security was given expressly to prevent the creditor from prosecuting for forgery.

There is nothing in the case before us to bring it within the principle of these cases.

Lord Blackburn's language, at p. 99, is clear :

"I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud, that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it, so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible, just as if he had originally authorized it. It is

quite immaterial whether ratification was made to the person who seeks to avail himself of it, or to another."

I can find nothing in this British Linen Company case to warrant our thinking that it was decided on any law but the law of England.

Lord Watson in reviewing the Scottish decisions in no way intimates any difference in the law.

Lord Blackburn merely intimates that the principles in the clear judgment of Parke, B., in *Freeman v. Cooke*, have not been so clearly recognised in Scotland as in England.

Lord Watson says the only reasonable rule to act on is that expressed in *Freeman v. Cooke*, and the appellants counsel stated in argument that the law as to bills of exchange in Scotland was not dissimilar.

It is well worthy of remark in this case that in discussing the effect of mere silence and not informing the holders of a forged bill, Lord Watson, after approving of *Freeman v. Cooke*, says:

"It seems a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by and not divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information."

We must read the remarks of the Law Lords on this point as to the bank's being prejudiced in the light of the facts, and bear in mind the "prejudice" spoken of was in the case of nonfeasance and not, as in our case of misfeasance. To my mind the distinction is very plain.

It is impossible to discuss the nature of the defendants responsibility without mixing up and perhaps a little confusing the terms, ratification and estoppel.

I consider there is good evidence here that the defendants ratified and adopted the draft in this case as their own act, without any reference to forgery or any corrupt or illegal bargain between them and the holders. That they

so ratified and adopted it after accepting from H. Young an authority to charge his account with the amount of this draft as being drawn in their names for his accommodation and having at the time funds of his, to some amount at least, treating the case between him and them as one merely of civil liability. That having so ratified they left the holders for a good many days under the impression they would pay it and I think they cannot be permitted afterwards to repudiate liability.

Their ratification and adoption was made once for all. They made their election to accept, and treat the draft as their own.

A ratification does not appear to require consideration, and where not obtained by any misrepresentation or bad faith in the parties to whom it is made cannot, I think, be afterwards repudiated.

No case has been cited in which a person ratified or adopted a bill not really signed by him, and after the lapse of days or months, was allowed to repudiate his obligation to the holder, and set up that his name had been forged.

It must have occurred in many cases that where a relative or friend for the first time discovers that his name has been forged, and to avoid exposure and prosecution, ratifies and adopts the obligation as his own without any corrupt motive or bargain with the holder, afterwards he discovers that the forgeries were numerous, and wholly beyond his means and exposure impossible to prevent, he would gladly have retracted his admission. I have not been referred to any such case.

I see no difficulty in the suggestion that there can be no adoption or estoppel thereon unless the act done was professedly done by H. Young as for the firm. He came to the bank as their agent and financial manager with paper for discount, professing to be their paper, and necessarily that he was acting for them. He said that McElderry, the drawee, was handling the goods of or acting as agent for the company. If the ratification or adoption be worth anything, it must amount to an admission by defendants



that they are bound on the draft as if they had manually signed it, or expressly directed H. Young to write their names for them. They make this admission with at all events the full knowledge that by using their names he had obtained the discount of this draft and applied the proceeds to his own use. It is either large enough to cover all this, or it is worth nothing.

I think also that the objections urged with much force for defendants as to his obtaining the proceeds at the bank by his own cheques is much involved in the same admission.

The draft was discounted for the defendants' firm. The manager says, "It was a cash discount." H. Young drew his own cheque "pay to the pro-cash or bearer."

The manager says, "The cheque was taken as is usually the case as a cash voucher for the teller."

By the Court—"As I understand what you mean by a cash discount is this, that the money is paid over at the time of the discount and you take that form as a voucher?" Answer—"Exactly, so."

By some irregularity or mistake it is said that the proceeds were placed to the defendant company's credit and the money was paid to him believing that he was acting for the company. It was just posted to defendants' credit and same day "H. Young" was put in by the teller, and it is carried to H. Young's account and he drew it out at the counter.

I at first thought this objection was important, but it seems to me it all resolves itself into this, that it was a cash discount and the proceeds paid to H. Young for the defendants, and the alleged mistake becomes immaterial, and that the substance of the transaction must be looked to and not the form. It would have been regular to have paid over the proceeds of a cash discount at once and the cheque would, as suggested, be taken as a voucher or receipt. It would apparently have been contrary to intention, at least on H. Young's part, to have carried the proceeds to the defendants' credit—as he required and intended to get the money at once and not, apparently,

to require him to draw or forge a cheque of the firm to get the money.

But, after all is not all this involved in the main question? Did the defendants knowing all the facts and that by H. Young's conduct they were called upon to assume liability on this draft, as drawers, elect to ratify and adopt the draft as their own? I think they have made themselves liable, and I agree in the hope expressed by my late learned brother Cameron, that the law of estoppel (or whatever other name it may be called by) "will prove elastic enough to operate in favour of the plaintiffs to make the defendants liable in this case."

I can draw no distinction between them. All they did was done in concert as joint action, and they were co-partners equally interested in the course to be adopted in reference to this bill.

I think the judgment below should be affirmed. It accords with my ideas of justice, and I hope it will be found not void in law.

BURTON, J.A.—The draft which is the subject of the action in this case is found to have been a forgery, and the Divisional Court have refused to interfere with that finding.

The right to recover notwithstanding that finding is based either upon ratification or estoppel.

Notwithstanding the doubts that have been expressed I take it to be clear, both upon principle and authority, that there can be no ratification of a forged instrument, an essential element in all cases of ratification being wanting, viz., that the act ratified was one assumed or pretended to have been done for or under the authority of the party sought to be charged.

This view of the law is strongly confirmed by referring to sec. 24 of the Bills of Exchange Act of 1882 in England, bearing in mind the language of the learned draughtsman of that Act, "that in drafting the bill his aim was to reproduce as exactly as possible the existing law whether it seemed to be good, bad, or indifferent."

This section declares that except in cases where the party has estopped himself, where a signature is forged, there can be no right to enforce payment through or under that forged signature, with a proviso that nothing in the section shall affect the ratification of an unauthorised signature not amounting to a forgery.

That with great respect appears to me to be a true declaration of the law as it existed in England before the passing of the Act, and as it exists here.

But I was at first somewhat impressed with the difficulty the defendants might possibly find themselves in from the fact that although in forging their names Hamilton Young could not be said to have assumed or pretended to act for them, he did pretend to act for them when negotiating the bill with the plaintiffs.

To this the defendants present two answers. That the indorsement or negotiation of the bill, like the making itself, was illegal and void, and could not be ratified. But they go further and say, even assuming that he professed to act as our agent, the proceeds should have been, as they were in fact, passed to our credit, and if they had been allowed to remain there we in ratifying would not have suffered any loss, but in truth after passing the amount to the defendants' credit the bank allowed it to be withdrawn on Hamilton Young's own cheque, so that when at the close of the day's business the entries of the day came to be posted, the amount of this bill was credited to the Hamilton Cotton Co., and Hamilton Young's account was to the same extent overdrawn. The clerks of the bank then cancelled the credit of the company and credited it to Mr. Hamilton Young. To speak of this as a mere matter of book-keeping is a misapplication of terms. It was an unauthorised transfer of the proceeds of the bill from the account to which it had been properly credited to that of Mr. Hamilton Young, who had improperly withdrawn it on his own cheque.

But it is said that if this was not a transaction which could not be ratified it was ratified after the defendants

became aware of it. Is this so? Ratification must be founded upon a full knowledge of all the facts.

Now when Mr. J. M. Young promised to send a cheque of what facts had he knowledge?

He knew undoubtedly through the letter obtained by Mr. Gibbons that this draft had been improperly negotiated, but he was not informed that in negotiating it he had acted or professed to act as the agent of the defendants; on the contrary so far as that letter gave information all that appeared was that he had improperly negotiated a blank bill to which the signature of the company was signed for his own purposes.

Had he then known that he had professed to act for the defendants, and that the proceeds of the bill had been passed in the first instance to their credit, and withdrawn without authority, he might not unreasonably have said to the bank "this is your affair you should have retained those funds, and you must look for payment to the acceptor, or to the person to whom you paid the money."

I am of opinion, therefore, that the defendants cannot be made liable on the ground of ratification, and before leaving this subject I wish to add that whether there is or is not a difference between the laws of England and Scotland in reference to the ratification of a forged instrument, it is clear that the House of Lords in deciding the Scotch appeal in the British Linen Case were considering the question of estoppel alone, and that as Lord Blackburn remarks, the principle which he assumes to be the law regulating the case had been recognized in England, ever since the very clear judgment of Baron Parke in *Freeman v. Cooke*, whilst the Scottish cases cited shew that those principles had not been so clearly recognized in Scotland.

Are then the defendants estopped from shewing the truth by any thing which is shewn in evidence?

It may be convenient in discussing this part of the case to premise it by again stating the well known rule as to estoppel by representation, which I understand to be that where a person by words or conduct makes a representa-



tion which he intends to be acted upon, and which is acted upon : or, if whatever his real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

This question would have been open as the law formerly stood under the plea of "Non fecit," but it may be convenient to test the question by inquiring what would have been necessary to state in pleading if it had been specially pleaded under the former system, one which if, as has been said, it occasionally led to a pursuit of the mere shadow of justice, was often a security against carelessness and uncertainty in decisions and laxity of thought and statement.

Such a plea must, to have been good, have stated that the defendants had in express terms, or by conduct made a representation to the bank of a certain existing state of facts, which they intended to be acted upon in a certain way, and that it had been so acted upon by the bank in the belief of the existence of such a state of facts to the damage of the bank ; any thing short of this would have been bad.

Now, when the bank discounted this bill, there had been no communication to them of any kind by the defendants. They paid the money to the forger and had sustained the loss.

But whilst the bill was still current, it was discovered that Hamilton Young had been guilty of irregularities, some of them consisting of improperly filling up bills which had been signed in blank, and using them for his own purposes ; and also of having committed in other cases forgeries of the firm's name.

He admitted to Mr. Gibbons on the 25th August, that there were three bills, including the bill in question, which he had improperly discounted for his own purposes, and authorised the defendants to charge them against funds of his in their hands, and we find in the evidence that

they were represented by him to the defendants to be blank bills, the signatures to which were genuine.

In the meantime the defendants had become aware of the forgeries, and this naturally complicated the case, as whilst the defendants might be willing to assume and charge against Hamilton Young's funds, bills upon which, though irregular, they would be liable, they might naturally decline to pay any bills which were forgeries, the payment of which might expose them to liabilities of the extent of which they could form no conjecture.

This bill which had been sent to Montreal for acceptance, was recalled, and the defendants called at the bank for the purpose, it is said, of satisfying themselves whether it was a forgery or not; and the statement of Mr. Young, one of the defendants, that he would send a cheque for the amount, and the omission of his partner to repudiate the bill at once, followed by the subsequent conduct of Mr. Young when applied to for the cheque, are relied upon as representations by conduct which put them to rest, by which, as I understand the term, the plaintiffs were induced to refrain from doing something which they might otherwise have done. Now, when we refer to their own letter, we find their own explanation of what they had refrained from doing and what they would do if the cheque was not sent, and it was this: "We will return the draft to Montreal, and notify Mr. McElderry of our having done so." Not a word is said of their having been injured or prejudiced in any way.

The first objection, if the matter had been pleaded, would be that it was not a representation of an existing fact; if Mr. Young had said to the plaintiffs "that is a genuine bill," it would have been an admission either of its being in fact their own bill or of the authority of Hamilton Young to sign it, but if the plea had stated, as the evidence is, that upon being shewn the bill he promised to send a cheque, that would not be a representation of an existing fact, but a promise to do something in future, and the pleading on that ground alone would have been bad.

It is not at this day open to question that the doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro which if binding at all must be binding as contracts. See *Prole v. Soady*, 2 Giff. 1; *Piggott v. Stratten*, 1 DeG. F. & J. 33; *Maddison v. Alderson*, 8 App. Cas. 467.

But assuming that in reliance upon that promise the plaintiffs were, as it is said, put to rest the remaining essential as I have pointed out is wanting, viz., that the plaintiffs had suffered an injury. This is essential to be pleaded and to be proved.

The interview at the bank was on the 3rd or 4th September, and the bank manager was advised on the 7th or 8th of the same month by a letter from Messrs. Blake, Kerr, Lash & Cassels, as the solicitors of the Bank of Commerce, that the indorsement of another bill which had been negotiated by Hamilton Young professedly on behalf of the Hamilton Cotton Co., through the same agency of the Merchants' Bank in Hamilton was a forgery.

Now what is the course taken by the plaintiffs after they failed to get Mr. Young to carry out his promise by sending a cheque, and after they knew of the other bill being forged. They wrote this letter on the 10th September to the defendants.

"THE HAMILTON COTTON Co.,

"City.

"Dear Sirs,—

"Hamilton, 10th September, 1883

"At your request we recalled your draft on F. McElderry & Co., Montreal, for \$2,760, (two thousand seven hundred and sixty dollars) due 28th inst. I have now to notify you that unless this draft is retired at once, I will return it to Montreal and notify Mr. McElderry of our having done so."

It is a pertinent inquiry that, if not a forgery, what right had the bank to require it to be retired before maturity, but the solicitors of the defendants replied on the 12th, as follows:

"The Hamilton Cotton Company have received your letter of 10th inst., and we are instructed to say that they

do not admit any liability on or in respect of the draft for \$2,760 therein mentioned, and you are free to deal with it in the way you suggest so far as the company are concerned."

As plain an intimation under the circumstances of the case that they resisted it on the ground of forgery as could well be conceived, as no other defence would be open to them against the holders of the bill for value without notice.

We have then the fact that even if we can assume that the plaintiffs were put to rest on the 3rd or 4th they had full notice on the 12th that the defendants repudiated all liability. Were they injured in the interval? If they had been it was for them to shew it in order to make out their plea, but in truth it is disproved. Hamilton Young was still in town and watched by their own detective, and did not leave the country for weeks afterwards, and as to the other point that they might have reached the funds of Hamilton Young in the firm's hands, even if founded on fact, I agree in the words of Mr. Justice Patterson in *Ryan v. The Bank of Montreal*, 14 A. R. 533, at p. 561, that "It is a suggestion too speculative to be the foundation of a legal right."

In the case of *Davis v. The Bank of England*, 2 Bing. 393, an action to recover from the bank dividends arising on the plaintiff's stock in the funds, which had been transferred to a third party by the plaintiff's brother under a forged power of attorney, it was held that although the plaintiff knew some months previously that the forgery had been committed and did not mention it to the bank until after the forger had made his escape from the country, that was no answer to the plaintiff's claim, although the plaintiff had also, with that knowledge, accepted from him a draft for the balance that the forger had in the hands of Messrs. Drummond.

That case may be also profitably referred to on the point of actual not possible injury being essential to the estoppel.

It was insisted there that the plaintiff was debarred from recovering these dividends because the bank in con-



sequence of the plaintiff not having given them information of the forgeries *might* have paid them to other persons, but the Court held that that was not enough, to operate as a defence to the action, they must prove that they had paid them to persons to whom they could have refused to pay them had they been informed of the forgeries.

But I think the recovery of the bank on the ground of estoppel would be opposed as much to justice as to authority. The defendants were, as well as the plaintiffs, grievously wronged by the act of Hamilton Young; the bank had made their loss without any default or negligence on the part of the defendants. J. M. Young, who was a brother of the party who committed the crime was placed in a very difficult and delicate position when he discovered that this bill was a forgery, and not as he had been led by his brother to suppose one of the blank bills which he had wrongfully filled up and negotiated for his own purposes, and in his anxiety to save his relative he might not unnaturally have formed the hasty conclusion of paying it, but his partner saw the extreme danger of such a course, and declined to do it. Mr. Young's course in not replying, or in replying evasively, may be open to the comments made upon it, but we are here for the purpose of deciding cases upon principles of law, and that alone; and if the case cannot be brought within ratification or estoppel, we should be arbitrarily inflicting a fine of several thousand dollars upon a litigant because his conduct does not come up to a particular standard of morality. It would, according to my notions, be contrary to every principle of justice to transfer this loss from the bank, who had unfortunately sustained it, on the mere ground that one of the defendants had at one time promised his cheque and put off the plaintiffs from time to time where it is not only not shewn that the plaintiffs suffered any detriment, but the contrary is clearly shewn.

I am of opinion therefore that the dissentient judgment in the Court below was the correct one and that the judgment of the Divisional Court should be reversed.

OSLER, J. A.—The facts upon which this case turns are not complicated. I do not discuss the evidence bearing on the question of forgery, though I have fully examined and considered it in consequence of Mr. Martin's objection to the finding of the learned trial judge. I can only say that in my opinion the evidence supports the finding, and, affirmed as it has been by the Divisional Court, no sufficient ground has been shewn for interfering with it.

The case presented is simply that of an instrument purporting to be a bill of exchange, to which the signatures of the firm name of the defendants as drawers and indorsers have been forged, and the question is upon what legal grounds they can be made liable.

It is said in the first place that they have ratified the alleged forgery, and secondly that they have, at all events, so acted as to estop them from alleging that it is a forgery. With great respect I am obliged to say that the evidence does not in my opinion bear out either of these contentions.

[After stating the facts, as above set forth, the learned Judge proceeded.]

I shall begin by observing that there was nothing in the conduct of the defendants which induced the plaintiffs to take the bill in question. Their position was neither better nor worse than that of any person who has been induced by the forger or utterer to advance money upon a forged bill, and it is merely a question whether in consequence of what afterwards occurred they can succeed in shifting their loss upon some one else's shoulders.

The onus of doing this rests upon them.

First, then, they say that although this bill was a forgery, and has been found to be such, the defendants have ratified it. According to my understanding of what a forgery is, and of the sense in which the term ratification is used in our law, these are inconsistent propositions.

I do not hope to be able to advance anything new on this subject, as the doubt which has been thrown upon it arises from what was said by Lord Blackburn in the case

I shall presently refer to. But it has been laid down by a court of great authority, in opposition no doubt to the opinion of Mr. Baron Martin in the same case, viz., *Brook v. Hook*, L. R. 6 Ex. 89, that a forgery cannot be ratified; that there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Opposed to the proposition, as thus stated, there is said to be also the observation of Lord Blackburn in the Scotch appeal case of *McKenzie v. British Linen Co.*, 6 App. Cas. at p. 99; 29 W. R. 477, that if a person whose name was used without authority "chooses to ratify the act even though known to be a crime he makes himself civilly responsible just as if he had originally authorised it." Of what Lord Blackburn said there on this subject it has been properly observed (*Chalmers on Bills*, 3rd ed. p. 66), that the English cases were not cited, and that the case turned on the ground that the facts had not created an estoppel.

These opposed opinions, however, if Lord Blackburn was using the word ratification in the sense in which it was used in *Brook v. Hook*, are based upon the radically divergent views which were taken of the nature of the act of forgery.

In that case it is clear that Kelly, C. B., who delivered the judgment of the Court, is speaking of ratification as a mode by which agency may be constituted, and he shews that the act which can be ratified must be one pretended to have been done for or under the authority of the party to be charged, and that a forger does not profess or act for another, but personates the man whose signature he forges, or pretends that the signature is his signature, not that the forger wrote it with his authority.

In *Wilson v. Truman*, 6 M. & G. 236, one of the leading cases on this subject, it is said: "An act done for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him." See also reporter's note at p. 239.

Lord Blackburn, on the other hand, treats the forgery of the signature as an act done by the forger *as professing to be agent* of the person whose signature is forged (6 App. Cas. at p. 100); and on that assumption it might no doubt be capable of ratification so as to make the supposed principal civilly responsible as if he had originally authorised it.

In the case in the Exchequer I find the question actually decided, and even if that case, not being the decision of a Court of Appeal, is not binding upon us, I am at liberty to say that the view there taken of the act of the forger as not being an act professing to have been done for or under the authority of the person sought to be charged and therefore incapable of ratification, commends itself to my judgment.

I am, however, by no means satisfied that Lord Blackburn was not using the word ratification as indicating something upon which an estoppel would be created against the defendant. I refer particularly to page 101, where, after having said on the previous page that the appellant's "conduct, and silence combined with his conduct, might prove a ratification," he says, speaking of his alleged duty to inform the bank that the bill was a forgery :

"It would be a different thing if it were proved that McKenzie knew that the bank had put the second bill with his name on it to Fraser's (the forger) credit, and knew that, at a time when he had reason to believe that he would be permitted to draw against it. His silence would then certainly prejudice the bank, and would afford very strong evidence indeed that McKenzie for Fraser's sake *thus ratified* Fraser's act for a time, and ratification for a time would, I think, in point of law, operate as a ratification altogether."

This is just what the Lord President of the Court of Session refers to in the passage from his judgment quoted at p. 99, "by his conduct, not silence merely, but silence combined with conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature."

Ratification is here treated, not as part of the law of principal and agent, but as something, in consequence of



which the bank was induced to change its position, and so raising an estoppel against the defendant. It is worth noticing that in the recent Imperial Bills of Exchange Act, the law on this subject seems to be laid down in accordance with the view in *Brook v. Hook*, just as on the question we recently had to consider in the case of *Ryan v. Bank of Montreal*, the same Act declares the law to be what it was there held to be.

In *La Banque Jacques Cartier v. La Banque D' Epargne, &c.*, 13 App. Cas., at p. 118, it is said in the judgment of the Privy Council, " Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which may be valid in itself and not illegal." *Evans on Agency*, 2nd ed., pp. 59, 64, 65.

Ratification in short is an inappropriate term in our law when used in reference to a forgery, for the reasons given by the Lord Chief Baron in *Brook v. Hook*. The person whose name is said to have been forged, may so conduct himself by admitting that the signature is his, or that he is liable upon the bill, or by other conduct as to justify the jury or judge in finding against him as a fact from the evidence that he did so sign it or authorised the signature. Such a finding would assume that there was no forgery, and would not depend upon the doctrine of ratification. Or the case may occur where the contract is upon some new consideration adopted as a new contract by the person by whom it purports to be made, and here again the question would not be one of ratification.

If the evidence will not support a judgment for the plaintiffs on one of these grounds, I think that in order to succeed they must shew that the conduct of the defendants has been such as to induce the bank in some way to change their position to their loss, and so to preclude or estop them from denying the signature or asserting it to be a forgery.

Now the only thing the plaintiffs have to rely upon here for what they call a ratification, (I am not now consider-

ing the question of estoppel) is the promise of the defendant Young to send up a check on the following day.

By itself that was a bare promise, and was quite consistent with the instrument being a forgery, though it might perhaps have been regarded as one fact among others which might have led the learned trial Judge to a different conclusion on that question. But that was its only value, and when the defendants failed to keep their promise we may think it not very commendable conduct, but all that can be said of them from a legal point of view is that they changed their minds.

I am also of opinion that the defendants are not liable on the ground of estoppel, because the facts on which the plaintiffs rely as establishing that ground fail to shew that they were placed in a worse position than they otherwise would have been by reason of the representations or other acts of the defendants. This is one of the essential elements of an estoppel in pais. It may be that the conduct of James M. Young in promising to send a cheque, and afterwards promising to come up to see the plaintiffs led them to believe that the bill would be paid by the defendants. They may be entitled to say that it even led them to believe that the bill was not a forgery. But on the receipt of the solicitor's letter of the 12th September, in reply to their threat that they would return the bill to Montreal, and would inform the acceptor that they had done so, they were at arm's length, and I think they must shew that in the interval their position had been altered to their prejudice. They may have been put to rest for that time, but that is not sufficient, they must shew that they have been damaged by being put to rest: *Simm v. Anglo American Telegraph Co.*, 5 Q. B. D. 188, 211.

In *McKenzie v. British Linen Co.*, already cited, Lord Blackburn says:

"I agree that if he (the supposed drawer) thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill, which if the bank had known of the forgery, they might have

used, it would be a sufficient alteration in the bank's position to preclude him as against the bank."

If in the interval between the promise to send the cheque and the letter of the 12th September, Hamilton Young, the forger, had escaped from justice, the plaintiffs would have been entitled to say that they had held their hand, relying upon the bill being a genuine one, in consequence of the promise. But when that promise was withdrawn, and all liability repudiated by the defendants, Hamilton Young being still in the country, and apparently in no haste to leave it, it seems to me that the plaintiffs were remitted to their former position with their rights, whatever they were, against him and the defendants, unimpaired, and in such circumstances I fail to see that any estoppel arises.

MACLENNAN, J. A.—This is an appeal from the judgment reported in 13 O. R. 520, by which the defendants were held liable for the amount of the forged bill.

The judgment proceeds on this, that although the bill was forged, the defendants are estopped from shewing that fact on the ground that they represented the bill to be genuine.

It was also argued in the Court below that the defendants were liable on the ground of ratification, and both grounds have been urged before us, and we have to consider whether the judgment can be supported on either ground.

I have given very careful attention to the arguments addressed to us on behalf of the plaintiffs, not without some inclination to support the judgment, but I have been unable to come to the conclusion that the plaintiffs have made out their case, so as to fix the defendants with liability.

The case made by the plaintiffs is, that the defendants are liable to them as the holders of a bill drawn and indorsed by the defendants, which was dishonoured by the acceptor. The defendants deny the drawing and indorsement, and

that is the issue. The onus is on the plaintiffs, and unless they establish the affirmative, their action fails.

The plaintiffs endeavoured to establish their case in two ways, first by proving that the bill was in fact drawn and indorsed by the defendants, and secondly, by proving that if it was not in fact so drawn and indorsed, yet the defendants are estopped by their words and conduct from denying that they really drew and indorsed the bill.

The plaintiffs first method of establishing the affirmative of the issue failed, the evidence was not sufficient to prove that the defendants had actually drawn or indorsed the bill. It was proved that both the drawing and indorsement were forgeries, and it was so found by the learned Chief Justice who tried the action.

This finding was affirmed by the Divisional Court, and was not further contested in the argument before us, but it was contended with great earnestness that the plaintiffs were entitled to uphold the judgment on the other ground.

I am unable to agree to that contention. What is proposed is to prove a fact by estoppel, and it is evident that the estoppel must be co-extensive, or at all events as large and wide, as the fact to be proved. Where the estoppel is by representation, the representation must include or cover the fact to be proved. It can have no effect as an estoppel beyond the limits of the represented fact. The doctrine of estoppel holds a party civilly responsible for a state of facts which does not exist, for a fictitious state of facts, on the ground of the deceit practised by the party, and it would be unjust to extend its effect beyond the strict limits of the fact represented.

Here the fact to be proved, is the drawing and indorsing of this bill by the defendants. It is proved as matter of fact that both were forgeries. Therefore, if it is to be proved at all, it must be proved by estoppel alone. If the estoppel comes short of full proof, it cannot be eked out by other evidence.

The representation then must amount to this, that this bill bore the genuine signature and indorsement of the



defendants, or was drawn and indorsed with their authority.

I shall now examine the evidence to see whether it is possible to hold as a matter of fact that either by words or conduct the defendants made any representation to the plaintiffs amounting to an assertion or acknowledgment, that the making and indorsement of this bill were genuine.

The bill bore date the 25th June, 1883, and was drawn at three months date. It was discounted the same day, and was sent forward for acceptance on the 27th June. It was returned from Montreal to Hamilton on the 26th or 27th August. The defendant Lucas called at the bank, and had his interview with the manager on the 27th August. The defendant Young had his first interview with the manager, and promised to send a cheque for the bill two or three days afterwards. The cheque was not sent, although telephoned for several times. On the 10th September, the plaintiffs wrote threatening to return the bill, to Montreal, and to notify McElderry, the drawee, unless paid immediately. About this time the bank heard of the forgery of an indorsement on the Ryan cheque. On the 12th September, defendants' solicitor wrote denying liability; and on the 13th the bank manager had his final interview with Mr. Young, demanding to know whether the bill was genuine.

The representations relied on whether by words or conduct were between the 27th August and 13th September, inclusive, a period of eighteen days. It is not pretended that there was anything material before or after these dates.

Up to the 27th the bank believed the bill to be genuine, but it is clear it was not the defendants who caused them so to believe. It was Hamilton Young who did that; he led them to believe it was genuine, and obtained their money by reason of that belief. Up to the 27th August the defendants were as free from all legal responsibility in connection with the bill as any stranger, and it is said that though that is so, they have so conducted themselves

since, that they have made this false paper their own, and that the loss which the bank made through their own want of caution is now to be cast upon them on the ground of deceit.

The first matter relied on is what took place between Lucas and Bellhouse, I take the account of it from Bellhouse's evidence at the trial.

"Q. Who next called to see you about the bill? A. Mr. Lucas came in on the 27th, the day the bill got back. He asked to see this bill. He said, 'You hold a bill on McElderry for \$2,760,' and asked to see it. I went to the outer office and got the bill and shewed it to him. Mr. Lucas was in the manager's office."

"Q. I believe Mr. Meredith, the manager, was away, and you were acting as manager? A. I was acting as manager. Mr. Lucas examined the bill very critically, both back and front. Seeing him examine it so carefully, I asked him, 'Is there anything scaly, (or words to that effect) in the bill, that you are examining it so carefully?' He did not reply directly, but he looked at it again and ran his thumb along the signature, and said, 'Ben is not usually so shaky.'"

"Q. Mr. James M. Young is usually called Ben? A. Yes, I told him the bill was recalled at the request of Hamilton Young, and I think as he went out of the office he said he would call in a day or two to see if the bill was taken up. I do not recollect his saying anything else."

"Q. Did he say anything about any persons calling?" A. No."

Now I think it is clear that this interview so far from representing or tending to represent that the bill was genuine must have had exactly the opposite effect. It must have raised doubts in the manager's mind, must have led him to suspect the bill, must have tended to lead him towards, not away from the truth.

The next occurrence is the interview with the other partner a few days afterwards. What was the manager to think? One partner had called to see the bill, examined it critically, and answered questions with caution and reserve, and here is the other partner who also wants to see it. The manager gave two accounts of the interview,

one on examination in chief, and the other on cross-examination by the defendants' counsel. The examination in chief is as follows:

"Q. Whom next did you see on the subject of the bill?  
A. Mr. James M. Young. He came in a few days afterwards—two or three days after, I should judge. He asked to know the amount of McElderry's bill. He asked to see the bill. I shewed him the bill. He was standing in the manager's office. I was present. He looked closely at the bill and examined it very carefully, and I said to him, 'will you send me a cheque for that?' And he looked at his watch and said it was rather late to-day to get up a cheque in time, but he would send me one up on the following day. I said that would do. Then he said, 'by the way, what is the amount of it, with the costs?' and took a memorandum of the amount."

"Q. Did the cheque come? A. No, it did not."

"Q. Did you call him up in any way, or have any communication with James M. Young? A. I telephoned several times to the Hamilton Cotton Company, asking them to send the cheque, and I never could get a satisfactory reply."

The cross-examination is as follows:

"Q. A few days after you say J. M. Young came and asked to see the bill? A. Yes."

"Q. You shewed it to him? A. Yes."

"Q. And he looked closely at it also? A. Yes."

"Q. And you asked him if he would send up a cheque, and he said something about sending it up the next day?  
A. He did not say something about sending it, but said he would send it."

"Q. Perhaps you had better tell me again what took place between you and J. M. Young on this occasion?  
A. He examined the note critically, and prepared when he got through to go away, and I said, 'Well, will you send me up a cheque for it?' he took out his watch and remarked that it was rather late to get a cheque up in banking hours that day, but he would send it up the following day, I said the following day would do, and he said, 'All right,' and went off."

"Q. And you say he asked about the amount of costs?  
A. He said, 'By the way, what is the amount?' and I shewed him the bill again."

“Q. That is all that took place between you and Mr. Young on that occasion? A. That is all that took place.”

“Q. After the bank received word from Messrs. Bruce, Burton & Culham that the Hamilton Cotton Company repudiated this note, then it was you and Mr. Kittson went down to see Mr. Young? A. Yes.”

“Q. Hadn't you heard of other alleged forgeries of Hamilton Young at that time? A. Yes, we got a letter from Toronto about the Ryan one.”

Now, I am unable to find in that interview any admission or representation that the bill was genuine. “He looked closely at the bill, and examined it very carefully.” “He examined the note critically, and prepared, when he got through, to go away.” Is this the conduct of a man who wishes to represent that the bill is genuine? Is it not the very reverse? If he meant to represent that, would he not have said so? What did the *close, careful, critical* examination of the bill by the ostensible drawer mean? What would it convey to the mind of the banker, who was already suspicious? To my mind it could convey but one impression—namely, that the bill was not genuine. But there is the circumstance that the banker said, “will you send me a cheque for that”? and the defendant answered, he “would send a cheque the following day.” In order to see the proper significance of this request and promise, it must be borne in mind that the bill was not due for another month, the 28th September. The bank had discounted it and had got the full discount for the whole period, and if the bill were genuine, the bank had no claim to be paid until the 28th September.

It is true it had been recalled by the direction of Hamilton Young, who said they were settling with the drawee; but nothing was said about taking it up before maturity.

It would be entirely out of the usual course of business for a mercantile firm to take up a discounted bill before maturity. Why did the banker ask for a cheque? To my mind the reason is plain. It was because he believed the bill was a forgery and he wanted to get it paid at once; and he thought the firm might prefer to



pay it rather than that their relative should be charged with crime ; and I think the proper inference to be drawn is not that he was led to believe the bill was genuine ; but to expect that he was going to get paid for a forged bill.

I think the same conclusion is to be drawn from the telephone messages, and from the letter of the 10th September. If he believed the bill to be genuine, why not wait till the 28th September, when it was due, instead of pressing urgently for premature payment. I look upon the threat contained in the letter of the 10th September, as being senseless and absurd, except upon the theory that they distrusted the bill, and intended to put pressure on the defendants to arrange the bill in advance of maturity.

If these interviews, and the pressure of payment by James M. Young led the banker to believe that the bill was genuine, it is very strange he does not say so in the witness box. It was very material for him to do so, and he had every opportunity of saying it, if it was the fact ; and it is a good reason for his not saying so if the fact were otherwise.

The rule the plaintiffs are invoking and seeking to apply not only requires that the representation be made wilfully, with the intention to cause belief, but also that it shall have that effect. There is no direct testimony in this case of any such effect, and in my judgment the only inference to be drawn from the testimony is the other way.

I do not think anything that took place after the first interview with James M. Young, helps the plaintiffs' case. The omission to send the cheque, the unsatisfactory answers to the telephone messages, the letter of the 12th September, and the final interview of the 13th September, are all, in my judgment against rather than in favor of the genuineness of the bill.

It has been argued that the promise to pay is in itself a representation of the genuineness of the bill. I agree that such a promise might, when coupled with other conduct, go to prove a representation of the genuineness, but I do not see that in itself it is such a representation. One may have

many reasons for promising to pay a bill besides its being his genuine signature, and in my judgment it is in itself no more than a promise, and a promise is not a representation of an existing fact within the rule under consideration : *Jordan v. Money*, 5 H. L. 185; *Alderson v. Maddison*, 8 App. Cas. 473; *Citizens Bank v. First National Bank*, L. R. 6 H. L. 360.

I, therefore, come to the conclusion that there is no proof in this case of a representation that the drawing and indorsement of this bill was the genuine or authorised act of the defendants; and I am of opinion that no representation substantially short of that will do.

I am further of opinion that there is no evidence that what was said and done by the defendants, was said or done with the intention of inducing the plaintiffs to believe that the bill was genuine, or that the plaintiffs were so induced, and I think it was necessary for the plaintiffs to give such evidence in order to succeed; *Carr v London and North Western R. W. Co.*, L. R. 10 C. P. 316, 317.

It is further essential to the application of the rule of law with regard to estoppel, to shew not merely that the plaintiffs were deceived by the defendants into the erroneous belief that the bill was genuine, but it must further be shewn that by reason of that belief they did something, or refrained from doing something whereby they were prejudiced; *Ex parte Adamson*, 8 Ch. D. 817, 818.

I have examined the long list of cases on this subject from *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Ex. 654, to the present time, many of which will be found under the *Duchess of Kingston's Case*, in 2 Sm. L. C., and I find the rule adhered to that there must be damage to bring the rule into play. Even *Knights v. Wiffen*, relied on by the plaintiffs recognises that rule. In that case the Court thought there was evidence of damage which brought it within the rule.

In *Smith v. Chadwick*, 9 App. Cas. 195, Lord Blackburn

says, "Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage \* \* and I think the plaintiff in such a case must not only allege but prove this damage. And Pollock in his book on Torts at p. 240, says: "There is no cause of action without actual damage, or the damage is the gist of the action."

In this case there is, in my judgment, no such evidence. The plaintiffs do not in their evidence from first to last, prove or even suggest anything that they did, or abstained from doing in consequence of defendants' conduct, and on argument the only thing that is suggested is that they might have prosecuted the forger, or might have sued him for the debt. On the other hand it is proved that the forger remained in Hamilton until the month of November, was actually under the surveillance of the plaintiffs during the month of September, and yet they did nothing.

I refer to *Pollock* on Torts, 240; *Mayne* on Damages, 67; *Barry v Crosky*, 2 J. & H. 23; *Peck v. Gurney*, L. R. 6 H. L. 412; *Arkwright v. Newbold*, 17 Ch. D. 320; *Smith v. Chadwick*, 20 Ch. D. 27 S. C. 9 App. Cas. 187; *Mullens v. Miller*, 22 Ch. D. 194; *Smith v. Land and House Co.*, 28 Ch. D. 16, and *Edgington v. Fitzmaurice*, 29 Ch. D. 459.

The other ground on which it was sought to rest this case is that of ratification. I am at a loss to see how there can be any ratification of the mere act of forgery. Ratification is the subsequent adoption or approval of an act done by a person professing to be an agent. But here the bill purports to be the bill of the defendants, signed not by the alleged agent, but by one of themselves. There was therefore here, I mean in the drawing and indorsing of the bill itself, no element whatever of professed agency, and therefore in my opinion nothing which could be ratified.

But, although the forger did not profess that he had drawn or indorsed this bill as agent for the defendants, yet he did profess to be acting for them in applying for the discount; but I think that is a distinct and separate act from the forgery itself. I incline to think that the procure-

ment of the discount professedly on behalf of the defendants, was an act which could have been ratified by them. I am, however, clearly of opinion that there was no such ratification in this case, because the defendants were ignorant that Young professed to be acting for them in getting the bill discounted. The only evidence of what they really knew is, what is stated in Young's letter of the 25th of August—namely, that the bill had been discounted in the plaintiff's bank for his accommodation, and that the proceeds had been applied to his own use. It is well settled that there can be no ratification without full knowledge of the facts; and the defendants could not ratify what they did not know, that Hamilton Young had professed to the bank that the discount he was applying for was for them.

In *Banque Jacques Cartier v. Banque d'Epargne de Montreal*, 13 App. Cas. 118, Lord Fitzgerald says, in delivering the judgment of the Privy Council: "Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which may be valid in itself and not illegal."

It seems to have been supposed that *Brook v. Hook*, L. R. 6 Ex. 89, decided that there could be no ratification of a forgery; but a careful examination of that case shows that such was not the decision.

On page 100 Kelly, C. B., who delivered the judgment of the Court admitted that in the case of a forged note where the forger professed to have signed with the authority of the apparent maker it could be ratified. If the forger utters the instrument as signed by the maker himself it cannot be ratified, but if he professes that it has been done by him with the maker's authority then it can. The distinction is thin, but it is precisely the distinction recognised in other transactions.

There is certainly some difficulty arising from the language of Lord Blackburn in *McKenzie v. The British Linen Co.*, 6 App. Cas. 99. But I think the apparent difficulty is removed by what he says at page 100, where he explains the language he had previously used. He says, "As I have



already said, I think if he ratified to anybody, or for any purpose the act done by Fraser as professing to be his agent," &c. I think this language is quite consistent with the decision in *Brook v. Hook*, which however was not cited to the Court, and is not referred to in the judgment, and it shews that Lord Blackburn considered that the element of a professed agency which is absent in this case is essential to ratification.

For these reasons I am constrained respectfully to differ from the opinion of the majority of the Common Pleas Divisional Court, and to agree with the opinion and the reasons therefor given by Mr. Justice Rose.

HAGARTY, C. J. O., dissenting.

*Appeal allowed with costs.*

[This case has been since carried to the Supreme Court.]

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THE CORPORATION OF THE CITY OF BRANTFORD V. THE  
ONTARIO INVESTMENT COMPANY.

*Assessment and taxes—Assessment Act R. S. O. (1887), ch. 193 secs. 34-35—  
Absence of jurisdiction to assess—Appeal to court of revision—Right  
to dispute validity of assessment in action.*

The defendant company carried on their business at London and were assessed there. They purchased the mortgages and other assets of the Brant Loan and Savings Company a similar institution which carried on business in Brantford. After this the latter company ceased to do business and the defendants left the mortgages and assets which had been transferred to them with an agent in Brantford for collection, but they had no branch office and did not carry on business there. The plaintiffs assessed them for personal property in Brantford from which the defendants did not appeal to the court of revision, and the plaintiffs brought an action to recover the amount of the assessment.

*Held*, that the defendants were assessable in London for the property which the plaintiffs had assumed to tax, and that as they had no branch office in Brantford and were not carrying on business there the plaintiffs' assessment of them was illegal and void; that there being no jurisdiction to assess them in Brantford the defendants were not bound to appeal to the court of revision and might question the assessment in the action.

*Nickle v. Douglas*, (in appeal), 37 U. C. R. 63, followed. Judgment of County Court reversed.

THIS was an appeal by the defendants from the County Court of the County of Brant in an action brought by the plaintiffs to recover from the defendants the amount of assessment rated on their personal property amounting to \$160, and for which sum together with \$8.00 interest his Honor Judge J. S. Sinclair, acting for the County Court Judge, gave judgment against the defendants.

The other facts appear in the present judgments.

The appeal came on to be heard on the 14th of September, 1888.\*

*Meredith*, Q. C., for the appellants.

*Hardy*, Q. C., for the respondents.

*Present*: HAGARTY, C.J.O., BURTON, PATTERSON AND OSLER, J.J.A.

November 13, 1888. HAGARTY, C. J. O.—The plaintiffs sue the defendants to recover a year's assessment for 1887, on personal property in Brantford. The defendants deny all liability to assessment. The plaintiffs rely also on the ground that the defendants although they had notice of this assessment did not appeal, and therefore had lost all right to object.

The facts are : The Brant Loan & Savings Company had carried on business in Brantford in premises on Colborne street, and had been assessed up to 1886, inclusive, for real and personal estate.

The defendants are a company carrying on their business at London and are assessed there. In or about June, 1886, the defendants appear to have bought or taken in security the mortgages and assets of the Brant Company, which apparently ceased to do business thereafter.

The Bank of London established an agency in Brantford in the premises of the Brant Company, and in June, 1886, Baxter came there as an officer of the Bank of London, the securities taken over from the Brant Company were placed in the bank agency for collection or security, and Baxter received moneys due or accruing thereon, and placed them to defendants credit in the bank agency books, whence they were transferred to the defendants' credit in London. These mortgages or securities were afterwards sent to the defendants at London.

I can see no evidence whatever that the defendants ever had either a branch office, or ever carried on any business whatever at Brantford. The mere fact of their collecting principal or interest on the mortgages taken over from the Brant company at the Bank of London agency cannot bring them within the claim for taxes set up by the plaintiffs.

Sec. 34 of the Assessment Act, R. S. O. (1887), ch. 193, provides that all the personal property of an incorporated company (other than certain excepted companies) shall be assessed against the company in the same manner as if

the company were an unincorporated company or partnership.

Sec. 35, (1) The personal property of a partnership shall of assessed against the firm at the usual place of business be the partnership. \* \*

(2) If a partnership has more than one place of business, each branch shall be assessed, as far as may, be in the locality where it is situate for that portion of the personal property of the partnership which belongs to that particular branch; and if this cannot be done, the partnership may elect at which of its places of business it will be assessed fo the whole personal property, and shall be required to produce a certificate at each of the other places of business of the amount of personal property assessed against it elsewhere (on this sec. see *Re North of Scotland*, 31 C. P. 558.)

The evidence fails to bring the defendants within either the letter or the spirit of the assessment, so far as the plaintiffs are concerned.

It was pressed on us that the defendants should have appealed to the revision court, and that the final adjustment of the roll affirming these assessments was final and conclusive upon them.

In *Nickle v. Douglas*, 37 U. C. R. 63, in this Court, my learned brother Burton discusses this point, and I fully concur in his conclusion that if the assessed party be neither resident in the municipality nor possessed of any assessable property therein he is not assessable, and he is not bound to appeal.

The case before us is far stronger against the municipality, as here there was neither residence, occupation, nor ownership of any thing assessable, and all the plaintiffs could shew in support of their claim would be the illegal act of their assessor, and the notice of assessment sent to the defendants in London. If this be sufficient they could compel any number of non-residents and non-owners over the province to appear and appeal against a wholly void



assessment at the peril of being conclusively bound by their omission so to do.

I consider the whole proceedings of the plaintiffs as *ultra vires* and (as it were) *coram non judice*, an assumption of a right to deal with a subject matter not within their jurisdiction. The cases up to its date are fully noticed in *Nickle v. Douglas*, and we have not been referred to any authority against the principle there laid down.

I think the appeal must be allowed, and the action below dismissed, with costs.

BURTON, J. A.—I think the learned Judge was in error in holding that this case did not come within the principle laid down in such cases as *Nickle v. Douglas*. If it had been established that the defendants had a branch office in Brantford then I agree that any disregard on the part of the assessor of the election of the company to be assessed at the principal place of business, or the ignoring the certificate of having been assessed elsewhere as provided in sub-sec, 2 of sec. 34, would be matter for appeal only, but there is no finding that the defendants had a place of business in Brantford, nor any evidence that would warrant such a finding. All that is before us is that certain mortgages which had been assigned to them were placed in the hands of a bank in Brantford for collection. For this property they were liable to be assessed at London, but there was an entire absence of jurisdiction to assess them for it in Brantford: that being so the assessment was illegal and void, and the action brought to recover the amount of it must necessarily fail.

I think therefore the appeal must be allowed.

OSLER, J. A.—The action is brought to recover moneys alleged to be due to the plaintiffs for taxes duly assessed against the defendants.

In the statement of claim it is alleged that the head office of the defendants is at the city of London, in the county of Middlesex.

It is also alleged that a branch of their institution was established at the city of Brantford, and that they carried on business there.

The former allegation was proved, the latter was not.

The defendants were taxable by the municipality of London in respect of the very same property for which the plaintiffs, the municipality of Brantford have assumed to tax them, and they were so taxable by the former municipality because they were resident there, and the property was personal property owned by them within the Province.

I do not think that there is anything in the Assessment Act which places a person, or partnership, or company in jeopardy of being legally assessed for the same property by two different municipalities. That would, however inevitably be the case if the question of jurisdiction to make the assessment was finally determinable by the court of revision subject to an appeal to the county judge.

The defendants were bound to return the property in question to the London assessor as taxable property owned by them within the province, even though the securities representing it happened for the moment to be in another municipality. They may have done so, and their assessment may have been confirmed by the two local appellate tribunals to which, as being admittedly residents in the municipality, they would be bound to resort. To the assessor of Brantford, the defendants, not being resident there, that is to say, having no branch there, were not bound to make any return. Yet the assessor of that municipality has assumed to tax them for the same property, and the assessment, as the plaintiffs contend, has been finally confirmed on default of appeal just as it might have been confirmed after an appeal if the court of revision or county judge in Brantford had taken a different view from the corresponding tribunals of the other municipality.

The jurisdiction of a municipality to assess in respect of personal property depends upon the fact of the residence of the owner, except in cases specially provided for, as for instance where the place of residence and place of business are not the same, or where the owner is not resident in the province, in which latter case sec. 33, sub-sec. 2, provides that it shall be assessed in the name of the agent, trustee, or other person who is in control thereof, and in the municipality in which it happens to be. The foundation of the jurisdiction to assess being in this case non-existent, it follows that the defendants were not bound to appeal to the court of revision, and may question the assessment in an action.

The appeal must therefore be allowed.

PATTERSON, J.A., having previously been appointed a Judge of the Supreme Court of Canada, gave no judgment.

*Appeal allowed with costs.*

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## SADERQUIST V. ONTARIO BANK.

*Banks and banking—Deposit receipt—Fraudulently obtaining money—  
Silence—Notice—Neglect.*

The plaintiff, a Norwegian by birth and almost totally ignorant of the English language, in September 1884, deposited with the defendants at one of their branch offices a sum of money and received from the bank the usual deposit receipt, at the time signing his name on the stub or counterfoil of the receipt for the purpose of enabling the bank to identify him at any time the money might be demanded. For the purpose of safe keeping, plaintiff, being about to proceed to work elsewhere, left the receipt with one S. S. About seven months afterwards plaintiff returned when he was informed by S. S. that he had withdrawn the money from the bank but promised to return it. The plaintiff being ignorant of the manner in which the money had been paid out and of his rights as against the defendants took no steps whatever against them, and S. S. absconded from the country in August, 1885, heavily indebted. In the month of December following, the plaintiff having been informed as to his rights against the bank consulted a solicitor who undertook to attend to the matter, but omitted to take any steps, and in the month of April following (1886) the plaintiff through another solicitor made a demand on the bank for payment which was refused. The demand so made was the first notice the bank had of the fraud which had been practised on them.

*Held*, affirming the judgment of the Chancery Division (reported 14 O. R. 586) (1) that the plaintiff in entrusting the receipt to S.S. was not guilty of any act of negligence. (2) that his delay in notifying the defendants of the fraud perpetrated on them was not a breach of any legal duty on his part so as to estop him from recovering the amount of his deposit.

THIS was an appeal by the defendants from the judgment of the Chancery Division (14 O. R. 586,) and came on for hearing before this Court on the 10th September, 1888.\*

*Moss, Q.C.*, for the appellants.

*G. T. Blackstock*, for the respondent.

The facts of the case and the points relied on are fully stated in the judgment in the Court below.

January 8, 1889. BURTON, J. A.—I agree with the Divisional Court that the plaintiff is entitled to recover, and I am of opinion that the statement of defence would have been bad upon demurrer. It admits that the bank held this money on

*Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.



deposit for the plaintiff, and shews that they have never repaid it to him but to a person who admittedly had no authority to receive it; but it is said that because he negotiated with this person hoping to obtain the payment from him he has lost his recourse against the bank.

The case was argued upon the hypothesis that the receipt was similar in its character to a negotiable instrument passing the property in the money by indorsement, or delivery. This receipt had no such attribute. It contained a provision inserted for the protection of the bank that they were not to be called upon for payment without the return of the receipt, but the production of the receipt alone would not authorise the payment by the bank to the holder of it. So that what we have to deal with is whether the payment of the money to a stranger can be justified because the plaintiff when he discovered it did not at once make his claim upon the bank, but hoped to obtain payment from the wrongdoer.

How that can be any defence to the bank I fail to see. Their position was not altered in consequence. Silence or concealment can be no answer unless the Court or jury dealing with the case can infer from it that the plaintiff was a party or privy to the fraud.

I refer on this point to the case of *Davis v. Bank of England*, 2 Bing. 393, to which I have more fully alluded in the *Lucas Case*, (ante p. 575).

As to the question of negligence, there can be no negligence without neglect of some duty. There was no duty here; no relation between the bank and the plaintiff which could cause any duty to exist from him to the bank, even if the leaving of the receipt for safe keeping with his friend, could be possibly regarded as a negligent act at all; but as said by Brett, L. J., in *Patent Cotton Co. v. Wilson*, 47 L. J. C. P. N. S. 715, in point of law no negligence can justify a thief or forger. It may be taken into account in punishing him, but it is impossible to say that any negligence can be a justification or excuse.

I agree with the Divisional Court that for these reasons

the plaintiff is entitled to recover, and that the appeal should be dismissed.

HAGARTY, C. J. O.—I very much regret being compelled by the pressure of authority to acquiesce in the judgment just delivered.

A. leaves property or money of his with B to be held for him. B's receipt therefor he leaves in the hands of his friend C to hold for him. He then goes away for some months. During his absence C goes to B, and either by personating A or by some fraudulent misstatement induces B to deliver A's money or property to him.

A returns, and C confesses to him his dishonest proceedings, and promises to repay A. A, and C, and B all live in the same town, and so remain living for several more months, and A never informs B of what C has done, or makes any demand on B for his property or money. C, who is in business in the place, after some months leaves the country involved in debt, and after a lapse of some 18 months A claims the amount from B.

A says he did not know what his legal rights were. It seems to me an almost intolerable state of the law that under such a state of facts he should recover. It is no answer, in my view, that the bank could have made nothing out of the rogue if they had been promptly informed of his fraud. They had several months opportunity of proceeding against him. The precise steps they might have taken are immaterial in my view of the law. As an inference from the facts I would believe that in all probability a prompt arrest on civil process at their suit of the rogue would have ensured a disgorgement of all or a goodly part of his prey.

Ignorance of the law on the plaintiff's part is urged on his behalf. But the instinct of every sane mind would surely have been that the person defrauded, should be at once told of the wrong committed; the alternative of silence involving the conclusion that the person wronged had finally elected to submit to what had happened.

It is always a matter of regret if the law appears to sanction what seems (to me at least) as opposed to our ideas of right and wrong.

It does seem extraordinary how loosely the process of defrauding was conducted in this case.

An alleged respectable man, Ole Brand, is called to identify the rogue. One would suppose that meant that the rogue was the person entitled to draw the money. But all he does apparently is to identify him as "Sandquist," not that he was Saderquist, or two names just as distinct as Smith and Smithson, or Jenkins and Jenkinson. What makes it more extraordinary on Brand's part is, that he was acquainted with Saderquist the plaintiff, and writes his name close under the very legible signature "Soderquist." But no question seems to have been put to him to explain what reads so curiously.

The appeal must be dismissed.

OSLER, J. A.—The facts of this case are simple. The plaintiff on the 24th September, 1884, deposited with the defendants at their Port Arthur branch the sum of \$650, and obtained therefor a deposit receipt, by the terms of which the bank agreed to account to him for the same with interest. Fifteen days' notice of withdrawal was to be given, and the receipt was to be given up to the bank whenever payment of principal or interest was required. In the margin of the book from which the receipt was taken the plaintiff wrote his signature, presumably for the purpose of identification when the receipt should be cashed, the bank also requiring the depositor then to write his name upon it, which except for a similar purpose was an unnecessary formality, the receipt not being transferable by indorsement or delivery.

On the 15th September, 1884, the plaintiff got a deposit receipt in similar terms for \$400, and also on the 24th September in the previous year for the same amount, his signature having been taken on each occasion in the margin of the book. These two receipts were

cashed by the plaintiff on the 24th September, 1884, part of the money being withdrawn, and the remainder re-deposited on, and represented by, the receipt of the 24th September, 1884.

Plaintiff was a labourer employed on the construction of the Canadian Pacific Railway, and being about to leave Port Arthur to work at Michipicoton, and being afraid of losing or wearing out the receipt if he carried it about with him, entrusted it to a fellow countryman who was the possessor of a name not very unlike his own, Swan Sandquist, to take care of it for him until his return. Sandquist conceived the idea of defrauding his friend or the bank, and on the 18th October, 1884, he presented the receipt for payment. It must be taken upon the evidence that the receipt had been entrusted to him unindorsed, and that he wrote the plaintiff's name upon it. He procured one Ole Brand to go with him to the bank to identify him. Brand did so, writing his own name for that purpose upon the receipt under the name of "S. Saderquist." According to Brand's evidence, however, he only identified him as Sandquist. He said that the receipt had not been shewn to him, and that he probably did not notice the difference between the two names, and supposed that Sandquist was entitled to the receipt from its being in his possession. He did not know whether Sandquist wrote the name while in the bank, or whether he had written it before. It is written twice; once, just over Ole Brand's signature as "S. Soderquist;" and again lower down as "Saderquist," the latter being struck out with a blue pencil, and both being quite unlike the signature retained by the bank in the margin of the receipt.

So far as appears, there is no reason to suppose that Brand was a party to the fraud, or that he knew that Sandquist was personating Saderquist. The examination of both Saderquist and Brand is, however, unusually meagre. The former was not expressly asked whether he had put his name on the receipt when he gave it to Sandquist, nor can I make out that he was interrogated at all



about the second or erased signature. We must, as I have said, accept his statement that "the signature" on the back of the receipt is not his."

Saderquist returned to Port Arthur in April, 1885, asked Sandquist for the receipt, and was told by him that he "had drawn the money on it."

Plaintiff's examination proceeds :

" Q. And what did you say to him ? A. I said, ' You had no right to draw the money on my receipt.'

Q. Did he say anything more ? A. Well, he was sorry about it, but he could not say anything ; he said he was going to pay me back again.

Q. When did you know anything about what your rights were ? A. I did not know any way to get the money till I asked my partners.

Q. That is the section-men ? A. Yes.

Q. Were they countrymen of yours ? A. Yes.

Q. Who first told you that you had a right to get this money from the bank ? A. A man whose name was Johnson.

Q. He is a Swede too ? A. Yes, Norwegian.

Q. When did you first see them, when did Johnson tell you that ? A. It was the winter before.

Q. Whereabouts were you ? A. It is December month, I think it was.

This was December, 1885. In the meantime Sandquist had left the country in August, 1885, heavily indebted. It is said that civil proceedings against him by the bank would have been fruitless. Under the circumstances I attach no importance to this fact. If by reason of any negligence of the plaintiff the defendants lost an opportunity of going against Sandquist by arresting him or otherwise, I think they would shew sufficient ground of damage to entitle them to recover. The plaintiff took no steps against the bank, and, indeed, made no demand upon them until April, 1887. In December, 1885, he consulted a solicitor as to his position, but nothing was done, and he seems to have assumed that he was without remedy.

In my opinion, upon the above state of facts, the judgment of the Chancery Division is right and ought to be affirmed. In cases of this kind where the defendants set up a payment made by them to the wrong person, as an answer to the demand of the rightful owner of the security, they are driven to rely upon some ground of estoppel

which prevents him from asserting it. This may consist of some negligence on his part which was the proximate and effective cause of the loss; or some conduct of his after he acquired knowledge of the defendants' error, which makes it inequitable that he should take advantage of it.

In the first place I think the plaintiff was not negligent. I cannot see that he acted otherwise than as an ordinarily careful man would act, in entrusting the receipt to Sandquist for safe custody. Negligence, as has often been said, to have the effect of estopping a party, must be negligence in the transaction itself, and it must be the neglect of some duty which the person guilty of it owed to the person who complains of it.

Now in the transaction itself, that is to say, the payment of the deposit receipt, no act of the plaintiff, (if it was not negligent merely to entrust the receipt to the custody of a third person,) conduced to the mistake or was calculated to deceive the bank into committing it. The plaintiff had not indorsed the receipt, though I don't mean to say that if he had done so it would have been negligence in a case where the instrument was not negotiable, but even that excuse was wanting here.

In short it cannot be said that the loss was caused by anything but Sandquist's fraud in personating the plaintiff and the defendants' omission to take the very precautions they had intended to take if the plaintiff had himself presented the receipt for payment.

The case of *The Mayor of the Staple v. The Bank of England*, 21 Q. B. D. 160, may be referred to as the latest case on the subject.

Can, then, the plaintiff's omission to give notice to the bank of Sandquist's fraud prior to his leaving the country be a defence. Delay after that time is unimportant, the Statute of Limitations not being in question. The plaintiff knew nothing of what Sandquist had done till after the bank had paid over the money and incurred the loss, and there is no evidence that up to the time Sandquist left the country he knew that he had any recourse

against the bank, a circumstance which is important as rebutting any inference that he had accepted Sandquist as his debtor instead of the bank, or had acquiesced in what he had done in obtaining the money. The doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights, and a man is not to be deprived of his legal rights, unless he has acted in such a way as would make it fraudulent for him to assert them. See *Willmott v. Barber*, 15 Ch. D. 96, per Fry, J., where the several elements necessary to constitute fraud of that description are very clearly stated. Two of those elements are wanting here. The plaintiff did not know of his own rights against the bank, and as it does not appear that he knew that the money had been obtained *by the commission of a crime*, he did not know of the bank's rights against Sandquist.

There was nothing but silence on the plaintiff's part. He neither said nor did anything to mislead the bank or to induce the belief that they were about to pay or had paid the money to the person entitled to receive it. In such circumstances, it appears to me to be decided by the cases of *Davis v. Bank of England*, 2 Bing. 393, and *McKenzie v. The British Linen Co.*, 6 App. Cas. 82, that there was no breach of any legal duty which the plaintiff owed to the bank, and consequently that he is not estopped from recovering the amount of his deposit.

I refer also to *Everest* on Estoppel, p. 350.

PATTERSON, J. A., having been appointed a Judge of the Supreme Court of Canada, took no part in the judgment.

*Appeal dismissed with costs.*

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# THE CORPORATION OF THE COUNTY OF VICTORIA V. THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

*Municipal Act, secs. 535, (2), 538—Bridges over rivers crossing boundary lines—Deviation of boundary road—Liability of counties to repair bridges in—42 Vict. ch. 47 (O.), effect of as to the townships of Verulam and Harvey—Territorial Act R. S. O. ch. 5—Township fronting on lake.*

By the R. S. O. ch. 184, sec. 535, sub-s. 2, it is the duty of the Councils of adjoining counties to erect and maintain bridges over rivers forming or crossing the boundary line between the two counties; and it is declared that a road which lies wholly or partly between two municipalities, shall be regarded as a boundary line, although it may deviate so that in some place or places it is wholly within one of the municipalities.

The boundary line between the counties of Victoria and Peterborough, in part of its course formerly passed between the 10th concession of the township of Verulam in the former, and the 19th concession of the township of Harvey in the latter county, the lots in the latter concession from 1 to 15, being a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake. By 42 Vic. ch. 47, (O.) these lots were detached from the township of Harvey and annexed to the township of Verulam, from and after the 1st of March, 1880, from all municipal, judicial, electoral, and school purposes, and for the purpose of registration of titles, as fully as if the same had always formed part of that township; and the remainder of the township of Harvey was entirely separated from the parts so detached for all purposes whatsoever.

*Held*, that by force of this Act and of the Territorial Act R. S. O. ch. 5, sec. 10, Verulam had become a township bordering on a lake, and that the boundary line between these two townships and consequently the county boundary line, in front of the range of lots so detached, was in the middle of Pigeon Lake, and no longer on the road allowance between such lots and the lots in the 10th concession of Verulam.

*Held*, also, [reversing the judgment of ROBERTSON, J.,] that the road on the former county boundary line, or on what might have been previously considered a deviation therefrom, was not a deviation within the meaning of sec. 535, from the road on the boundary line between the counties to the north of the range of lots transferred to the township of Verulam; and, therefore, that the duty of maintaining a bridge over a river crossing the road on the former boundary line or deviation therefrom, and which was wholly in the county of Victoria, was cast upon that county alone; and that the adjoining county of Peterborough was not liable therefor.

The term "deviation" is used in the same sense in sections 535, (2), and 538. Its meaning considered, and the case of *Brant v. Waterloo*, 19 U. C. R. 450, approved.

THIS was an appeal by the Corporation of the county of Peterborough from a judgment of Mr. Justice Robertson, pronounced on the 14th of March, 1888, in favour of the corporation of the county of Victoria, reported 15 O. R. 446.

The judgment as finally entered, declared,



"That the bridges in question herein, \* \* are under the joint control and liability of the counties of Victoria and Peterborough, and that the municipality of the county of Peterborough, is liable to contribute to the maintenance and repair of the said bridges, and doth order and adjudge the same accordingly.

"And this Court doth order and adjudge that the defendants do pay to the plaintiffs their costs of this action, to be taxed."

The appeal came on to be heard on the 26th September, 1888.\*

*Robinson, Q.C., and Edwards, for appellants.*

*Moss, Q.C., and Hudspeth, Q.C., for respondents.*

The points raised are stated in the judgments.

November 13, 1888. BURTON, J. A.—If, in the original survey of the townships of Harvey and Verulam, the lots from 1 to 15, inclusive, of the former township, had been laid out as part of Verulam, the road between the two counties to the north would have terminated at the southern limit of lot 16 in Harvey. That road ending there would have been a "boundary road" within the meaning of sec. 535, although it might in some places deviate so as to lie wholly in the one municipality; but, in such a case, could it be plausibly contended that an extension beyond the southern end of the boundary road could be considered to be a deviation within the meaning of the statute, that extension continuing through the other municipality for several miles before again reaching the boundary between the two counties. It appears to me that that would be a most extravagant construction to put upon the word "deviation," which, as pointed out in *Brant and Waterloo*, 19 U. C. R. 450, was intended to refer only to those cases of deviation rendered necessary in order to obtain a good line of road.

I am not at all prepared to say that before the Act 42 Vict. ch. 47 (O.), when the boundary line between the two counties extended in a straight line between the townships

\**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

of Harvey and Verulam until it struck the waters of the lake near the front of the township of Verulam, the deviation in question, through the village of Bobcaygeon until it rejoins the boundary road at lot 14, could not have come within the meaning of the statute; nor should I be prepared to say that the line marked down on the plan from that point to the bridge, where the boundary line is again reached, might not have been within the meaning of a deviation. Much would depend upon the circumstances shewing the necessity of leaving the true boundary line; but on the assumption that Verulam had, in the original survey, extended to the lake, I repeat it would, in my opinion, be impossible to hold that a road running for the distance of several miles wholly in the one county, in order to form a junction with the true boundary road at the south, was such a deviation as was contemplated by the legislature.

Then what is the effect of the statute to which I have referred? It enacts:

“That from and after the 1st day of March next, (1880), all that portion of the township of Harvey, which lies west of Pigeon Lake, consisting of all the lots in the 19th concession, from 1 to 15 inclusive of both numbers, shall be detached from the municipality of the township of Harvey, and shall be attached to the municipality of the township of Verulam, in the county of Victoria, for all municipal, judicial, electoral, and school purposes; and also for the purposes of registration of titles, as if the same had always formed part of the said township of Verulam, and the rest of the township of Harvey, shall be entirely separated from the portion so detached for all purposes whatsoever.”

As I read the enactment, it declares that the portion of Harvey referred to shall form part of the county of Victoria as fully as it had always formed part of that county, having the lake as the only boundary for some eight or nine miles between the two counties. If it had been intended to reserve the former travelled road as still being a road under the joint jurisdiction of the two counties although not continuing to be the boundary line between them, we should have expected to find a declaration to that effect.

In the absence of such declaration I do not feel myself

at liberty to place any limitation upon the very general words of the statute, and if according to the original survey the boundary line between the two counties had run a certain distance, then have been interrupted by the lake for a distance of several miles, and afterwards been continued in a southerly course, I should have been compelled to hold that the words of the Act would not warrant me in treating an extension to unite these two boundary lines for several miles wholly within the one county as a deviation; so neither can I on the words of this statute hold that the original boundary line between these two points still retains that character.

I am of opinion, therefore, that the road and bridge in question are not part of the boundary road within the meaning of the Act of Parliament, and that the county of Peterborough is not bound to contribute to it.

The county having contributed since the passing of the Act cannot affect their liability.

The appeal should therefore be allowed.

OSLER, J. A.—This is an appeal by the defendants from the judgment of Robertson, J., at the trial of the action, declaring that certain bridges were under the joint control of the two counties, and that the county of Peterborough was liable to contribute to the repair of the same.

The bridges in question are not built at the boundary line between the counties, nor, as will hereafter appear, does the river in fact now cross or reach the boundary line. They are built across the river at a place wholly within the county of Victoria, and the question is whether, under the circumstances, the road which is there crossed by the river can properly be described as a deviation of a road which lies wholly or partly between two county municipalities, so that the bridges built there can be said to be bridges built over a river crossing a boundary line, within the meaning of section 535, sub-section 2 of the Municipal Act.

The boundary line between these counties formerly ran,

from the north (describing it,) to the Bobcaygeon River, which crossed it where it passed between lot 15 in the 19th concession of Harvey, in the county of Peterborough, and lot 16, in the 10th concession of Verulam, in Victoria. Thence it continued southerly across the river and between other lots in the 19th concession of Harvey, and the 10th concession of Verulam to the waters of Pigeon Lake, which it entered at the south end or boundary of the broken lot 1, in the 19th concession of Harvey, continuing thence down the lake and leaving it near the foot at a point between the 8th concession of Ennismore, in Peterborough, and the 12th concession of Emily, in Victoria, and thence to the southern boundary of the counties.

The range of broken lots one 1 to 15 inclusive in the 19th concession of Harvey was geographically connected with the township of Verulam, forming a narrow strip of land on the west side of Pigeon lake, by the whole width of which it was separated from the other part of the township of Harvey. At a point between lots Nos. 17 in the 19th concession of Harvey, and 18 in the 10th concession of Verulam, the road on the county boundary line instead of continuing to the river, along the road allowance, deviates in a south westerly direction, passing through lots 18, 17, and 16 in the 10th concession to the north or upper branch of the river. At this point, the bridges in question are erected, crossing the river in its course through lot 15 in the 10th concession of Verulam. The road then turns in a north easterly direction, through the village of Bobcaygeon until it re-enters the former county boundary line at a point between lot 15 in the 10th concession of Verulam and lot 14 in the 19th concession of Harvey continuing thereon until it reaches the south or lower branch of the river, which crosses the boundary line between lot 14 in the 10th concession of Verulam and 13 in the 19th concession of Harvey, where there is another bridge which is not now in question. Below this point the road was continued for a short distance on the former boundary line along



part of the range of broken lots in the 19th concession of Harvey, and then leaving it in a westerly and south-westerly direction did not again re-enter it until it did so by a bridge 8 or 9 miles distant at the foot of Pigeon lake. This was the condition of things as regards the boundary line, and the roads and bridges thereon or on anything which could be called a deviation therefrom in the year 1879.

By an Act passed in that year, 42 Vict. ch. 47, (O.) the range of lots on the west side of Pigeon lake, being all the lots in the 19th concession of Harvey from 1 to 15 both inclusive, was detached from the township of Harvey and annexed to the township of Verulam from the 1st March, 1880, "for all municipal, judicial, electoral, and school purposes, and for the purpose of the registration of titles, as if the same had always formed part of the township of Verulam," and the rest of the township of Harvey was entirely separated from the portion so detached "for all purposes whatever."

The necessary consequence of this legislation, in my opinion, was, that from the 1st March, 1880, the boundary line between the townships of Verulam and Harvey, which had hitherto been also the boundary line between the counties, was no longer the line between the 19th of Harvey and the 10th of Verulam; but, by force of the Territorial Act, R. S. O. 1887, ch. 5, sec. 10, as to townships bordering on a lake, was projected in front of the above range of lots, which had thus become part of the township of Verulam, to the middle of Pigeon Lake. In other words, the boundary line between the townships, so far as there was or could be any road constructed thereon, terminated on arriving at the southern limit of lot 15 in the 19th con. of Harvey and lot 16 in the 10th of Verulam. From thence it was an imaginary line through the middle of the lake, and the former boundary line and any road thereon or deviation therefrom was wholly within the county of Victoria. The plaintiffs contend that the boundary line between the two counties is not altered because the Act does not in terms say that it shall be. I suppose this argument would hardly

have occurred to them if Pigeon Lake had not been in existence and a range of unbroken lots had been detached from Harvey and annexed to Verulam, still leaving a road or road allowance between the portion so detached and the remainder of the township of Harvey. It is because the townships have become townships bordering on a lake that the boundary of each has been altered. It would be difficult to employ stronger language than the legislature has used in effecting the separation. As to Verulam, all the purposes for which the part detached ever had, or could have belonged to Harvey, are specified, and for those purposes it is to be part of Verulam as if it had always formed part of that township. If it had always done so, its boundary line as a municipality must have been what it is now said to have become; and it is detached for all municipal purposes among others.

It is to be observed that the Act upon which the plaintiffs rely, and which now forms sub-sec. 2 of sec. 535 of the Municipal Act in the Revised Statutes, was passed in 1885 (48 Vic. ch. 39, sec. 22), and therefore some years after the change which had been effected in the township and county boundary by the 42 Vic. ch. 47 (O).

Can it then be said the bridges in question are erected in a road which is a deviation from a boundary line road lying wholly or partly between two municipalities, which I take to mean a road running along or between their borders.

It will, I think, assist in the determination of this question, if we briefly examine the group of sections of the Municipal Act 532-540, relating to 'County Roads and Bridges,' 'Township Roads,' and "Roads under joint jurisdiction."

Section 532 enacts that the county council shall have exclusive jurisdiction (*inter alia*) over all bridges over rivers forming or crossing boundary lines between two municipalities, that is to say, two municipalities in the same county.

It was not argued that under the other provisions of this

section the county of Victoria has exclusive jurisdiction over the bridges in question as being bridges crossing a stream or river over 100 feet in width within the limits of an incorporated village in the county.

Section 535. It shall be the duty of county councils to erect bridges over rivers (forming or) crossing boundary lines between two municipalities (other than a city or separated town) within the county, and in case of a bridge over a river (forming or) crossing a boundary line between two counties, or a county and a city, such bridge shall be erected and maintained by the councils of the county, or county and city respectively.

This section stood thus in the Revised Statutes of 1877, ch. 174, taken from section 413 of the Municipal Act of 1873, as amended by 37 Vict. ch. 16, sec. 19 (1874), and also in the Municipal Act of 1883. I assume that it was considered at least doubtful whether it imposed a liability upon adjoining counties, except in the case of a bridge erected over a river crossing a road on the *actual* boundary line, for by the Municipal Act of 1885, (48 Vict. ch. 39, sec. 22), the section was amended by the addition of a subsection which declares that a road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of the section, although it may deviate so that it is in some place or places wholly within one of the municipalities, and that a bridge built over a river crossing such road where it deviates as aforesaid, shall be held to be a bridge over a river crossing a boundary line within the meaning of the section.

It is under the section as thus amended that the present action is brought.

We must next notice the duties cast upon the township councils, in respect of boundary line roads.

By section 536 all township boundary lines within the county, that is, boundary line *roads* as the next section shews, not assumed by the county council (under section 533) shall be opened, maintained and improved by the township councils, *except* where it is necessary to erect or maintain

bridges over rivers (forming or crossing boundary lines between two municipalities; the duty and liability in that respect having been imposed upon the county by section 535 as we have already seen.

Then follows section 537, which provides that the township boundary lines, (by which is meant as before *roads* in the boundary line) which form also the county boundary lines, not assumed or maintained by the respective counties interested, are to be maintained by the respective townships bordering on the same; with a similar exception as to the bridges (forming or) crossing the boundary line, which by section 537, are to be erected and maintained jointly by the councils of the two adjoining counties.

Section 538 then declares what roads are under a joint jurisdiction.

In case a road lies wholly or partly between a county, city, town, township, or incorporated village, and an adjoining city, town, township, or incorporated village, the councils of the two municipalities between which it lies, shall have joint jurisdiction over the same; although it may so deviate as in some places to be wholly or in part within one or either of them. So far as this section relates to a road between one county and another county, it probably refers to the case of a road assumed by the counties or one of them; or, if such a case can occur, a county boundary line road which is not also on a township boundary, as otherwise the municipalities having joint jurisdiction are those of the townships on the opposite side of the county boundary line. See, for example, the case of *Maw v. King and Albion*, 8 A. R. p. 249, which was an action against townships in different counties for injuries sustained in consequence of the boundary road being out of repair.

The section concludes with two exceptions, shewing that, although the jurisdiction conferred over the road in general is a joint one, the bridges in the course of the road are not in any case intended to be withdrawn from the jurisdiction of the county council or councils: (1) The said road shall



not include a bridge over a river forming or crossing a boundary line between two municipalities: (2) "other than counties," words which were first added to the section by 45 Vic. ch. 25, sec. 13, either to prevent a conflict with sec. 535, which imposes the duty upon counties in the case of bridges over rivers crossing boundary lines, or to meet the case where the counties already liable under that section to maintain the bridge, also assume the county boundary line road.

These sections, whatever difficulties their construction presents in other respects, indicate clearly that the duty to maintain the boundary line roads in the case of townships and counties, where not assumed by the county council, and the joint jurisdiction over them, is cast upon the adjoining townships, whether in the same or adjoining counties, while the duty to erect and maintain the bridges in the course of such roads is devolved upon the council of the county, or the councils of the two counties as the case may be; and further, that as in the one case there is a joint jurisdiction over the road as a boundary road, though it may occasionally deviate from the exact boundary line, so in the other the liability and duty exist in respect of the bridge if it is built or necessary to be built in the course of such deviation. Sub-sec. 2 of sec. 535 is, in short, as regards the liability of the county the complement of sec. 538, as regards that of the townships.

Unless, therefore, the deviation can be regarded as a deviation of a road between two municipalities over which as a part of such road the adjoining townships would have joint jurisdiction under sec. 538, it cannot in my opinion be regarded as a boundary line road or deviation thereof under sub-sec. 2 of sec. 535, so as to cast upon the councils of the two counties the duty of maintaining a bridge over a river crossing such road.

*McBride v. York*, 31 U. C. R. 355, illustrates the case of a deviation of a road dividing different townships. There was the full original allowance for a road between the townships of York and Vaughan. For some reason a

part of it was not opened opposite to a particular lot, and the road deviated from the original allowance across the end of that lot. The deviation was held to be a part of a road dividing different townships, so that, (as the Municipal Act then stood, sec. 341 of the Act of 1866), it could only be closed by the county council.

The term "deviation," indicates a departure from some other course or way which might have been pursued at more or less inconvenience, and is inappropriate where there is none such to follow or deviate from. It is used in the Act as meaning a departure from the allotted road allowance in the boundary line where that is necessary, as Sir John Robinson observes in the case of *Brant v. Waterloo*, 19 U. C. R. 450, 457, for the purpose of obtaining a good line of road. Here the allowance for road between Verulam and Harvey, after the 1st March, 1880, terminated, going in a southerly direction), on arriving at lot 15 in the 19th concession of Harvey, and lot 16 in the 10th concession of Verulam. From thence there was no township boundary line between those townships, for a distance of nearly half their width, in respect of which there was, or could be, any joint duty cast upon them by sections 537 and 538, unless it can be said that the road already described on which the bridges in question are built, commencing on lot 18 in the 10th concession of Verulam, and in its various courses through that township, is a deviation of a township boundary road.

The Act must receive a reasonable construction, and this I think we should not be giving to it were we to hold that a road eight or nine miles in length wholly within one township, not substituted for any possible road on a boundary line, was a deviation of a boundary line road within the meaning of the section referred to, with all the consequences attaching to it as such, and among others the duty of maintaining it by the two townships of Harvey and Verulam jointly, under sec. 536, and of erecting bridges on its course by the counties, as well as the power of the county council to assume it, under sec. 533, as being

part of a township or county boundary line, instead of being, as I think it is, a road within the township which the county council could not assume without the consent of the township, under sec. 532.

The appeal must therefore be allowed.

HAGARTY, C.J.O., concurred.

PATTERSON, J.A., gave no judgment, having since the hearing, been transferred to the Supreme Court of Canada.

*Appeal allowed with costs.*

[This case has been since carried to the Supreme Court.]

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LONDON MUTUAL INSURANCE COMPANY V. CITY OF LONDON.

*Assessment and taxes—Mutual Insurance Company—Income—Assessment—  
Decision of County Judge, finality of.*

The plaintiffs, a Mutual Insurance Company, carrying on business in London (O.), were assessed for the gross amount of their receipts after payment of the year's losses and expenses, from which assessment they appealed successively to the Court of Revision and the County Judge, both of whom sustained the action of the assessor, which was affirmed by Proudfoot, J., on the ground that the decision of the County Judge was final; and an appeal to this Court was on a like ground dismissed with costs.

Where the assessor has jurisdiction to assess the property, his assessment can only be reviewed in the mode provided by the act, viz., by appeal to the Court of Revision, and the County Judge.

THIS was an appeal by the plaintiffs from the judgment of Proudfoot, J., reported 11 O. R. 592, and came on for hearing before this Court on the 13th May, 1887.\*

Moss, Q. C., and E. R. Cameron, for the appellants.

W. R. Meredith, Q.C., for the respondents.

The facts are clearly stated in the report of the case in the court below.

October 25, 1887. HAGARTY, C.J.O.—There have been many decisions in our Courts from which may be gathered the principles on which it has been considered that the right of the Superior Courts, and of this Court, to reverse the action of the tribunals appointed by the Assessment Acts.

Where there was a total want of jurisdiction in enforcing the payment of an assessment here, as in England, the action would lie of trespass or by replevin of the goods seized, or by action to recover back money paid under duress.

In *Scragg v. City of London*, 26 U. C. R. 263 (1867), many of the decisions down to that date are collected.

The language of Burns, J., in *Municipality of London v. Great Western Railway*, 17 U. C. R., 262 6 is cited:

“The distinction where it is necessary to appeal (*i. e.*, to the Revision Court), and where the claim may be resisted by an action of trespass or replevin is this—if the power

\**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



existed to make the assessment then there is jurisdiction in those doing it, and in such case the remedy is by appeal only – but if the assessment be illegal, then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal action.”

Also the pointed language of Alderson, J., in *Marshall v. Pitman*, 9 Bing. 595 :

“The existence of the jurisdiction is one thing, and the mode of exercising it is another, and if the plaintiff be an inhabitant he is within the jurisdiction of the justices.”

This was under the Poor Law.

Tindal, C. J., says :

“Here we must see whether this party was an inhabitant, for if he is the rate is a question of amount for the Sessions. It is admitted that if he had the smallest amount of property to be rated, his proper course would be to appeal to the Sessions. It is contended that where he has nothing ratable, he is entitled to proceed by action. But the sounder distinction seems to be that as an inhabitant possessing visible personal property he is liable to be placed on the rate, though his ratable property turn out afterwards to amount to nothing.”

In *Governor of Bristol Poor v. Wait*, 1 A. & E. at p. 280, Lord Denman says of *Marshall v. Pitman* :

“It only proves that an apothecary possessing personal property in a parish where he inhabits, cannot treat as a nullity a rate wherein he is assessed in respect of his stock-in-trade, though he may be able to shew that he has no stock-in-trade, and though no other personal property but stock-in-trade has ever been rated in that parish. But as the Act renders personal property ratable, the overseers have clearly a legal right to rate it, and to enforce payment of such rate by the ordinary means : and the party can have no remedy against an unfair or excessive rate, but by appeal to the Quarter Sessions.”

In the case before us there is no doubt that the appellants had some visible personal property within the limits of assessment, so the case does not fall within the authorities.

In *Nickle v. Douglas*, 37 U. C. R. 51 (1875) in this Court the cases down to that date are very fully noticed. The decision turned wholly on the question whether stock in a bank in Montreal was assessable in Kingston against a resident of that municipality, and it was held that replevin could be supported the subject matter of assessment being wholly exempt.

It does not appear to me that there was any decision going beyond the point that there was no jurisdiction to assess property not in any way liable to assessment.

In *City of Toronto v. Great Western Railway*, 25 U. C. R., 571, they assessed the land of appellants at a named rate, and the station building on the land at another named rate. On appeal the County Judge, who confirmed both assessments, reserved a case for the Superior Courts, as to the right to assess the building over the assessed value of the land under the statute. It was held that he had no right to state a case; that he had in effect confirmed the assessments. Draper, C. J., said that if he had simply confirmed the decision of the Revision Court: "We do not imagine it could be questioned that neither in this nor in any other form could his judgment be reviewed."

He also said, "that if the assessors, or the Revision Court, had put the two annual values in one as forming the whole valuation of the land, though there might have been an appeal to the county Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how, under the statute, his decision could have been brought in question."

On the principle laid down in this case, if the assessor had assessed the company in one named sum, merely describing it as "Personal property," when the matter came before the county Judge, under the Assessment Act of 1881, 44 Vict. ch. 25 sec. 4, (O.) the court may "re-open the whole question of the assessment so that omissions or errors in the assessment may be corrected, and the accurate amount for which the assessment should be made be placed on the assessment roll by the Court or Judge.

The whole question would thus be open and at large, and it would devolve on the Judge to ascertain the true amount on the whole case and, to say what portion was assessable and what was not.

In the case before us, looking at the plaintiffs' statement of assets p. 16, it is simply impossible to say that they were not possessed of some personal property liable to assessment. It appears to me that the law casts on the learned Judge below the serious responsibility of deciding what the proper limit and extent of assessment liability may be, and that we have no jurisdiction to review his decision.

I am not prepared to hold that the judgment of my learned brother Proudfoot was wrong. He considered as to the principal point in the case, the assessment on the \$26,600, that it was for the Judge below after hearing the parties to decide it as a question of fact and that there could be no appeal from him.

He considered that in this case there was "a general jurisdiction over the subject matter."

I fully agree that there was such general jurisdiction in the present case. The personal property in question does not fall within any of the exemptions mentioned in the statute and it was for the appellants to prove to the satisfaction of the Court that it was not liable.

The appellants have certainly not given us any very intelligible explanation of the exact nature and position of the large item called the "Re-insurance Fund," and for myself I have to say, that I have no clear ground on which I could hold that it was not assessable, and even if we had the right to review the decision, it has not been made plain to me that any actual wrong has been done.

It may be that the Legislature ought to be asked to define more clearly the assessable character of the assets of companies whether doing business on the mixed principle of the appellants' association or solely on the premium note system.

BURTON, J. A.—I am of the opinion that the judgment appealed against is right, and ought to be affirmed.

As at present advised I think I should have held that the sum raised by call on the premium notes was not income within the meaning of the Assessment Act, but the making of the assessment is entrusted by the law to certain functionaries whose acts are subjected to review by a Court of revision, and to a further revision by the Judge of the County Court.

If in the exercise of his functions, but acting within his jurisdiction the assessor does an erroneous act, it is no more null and void, while unquestioned by appeal, than an erroneous decision of this Court on a matter within its jurisdiction, whilst unreversed.

Here there was a sum of money in the hands of the insurance company which the assessor rightly or wrongly assessed as income.

The Legislature has thought fit to entrust the power of adjudicating upon the correctness of that Act to certain persons, and as a general rule those persons alone can do so.

Their powers are very large as they can by an amendment adopted in 1881, do precisely what the assessor could have done in the first instance, that is to say, whilst holding that this assessment was erroneous, it was competent to the Court of Revision or the County Judge to have held that there was other personal property to a like or larger amount for which the company was liable to assessment, and so refuse to interfere.

It is alleged in the reasons against the appeal that that was the case in the present instance, and that the learned County Court Judge rejected the plaintiffs' appeal on the ground that if not assessable for income, as such, they were assessable for a similar or larger amount on personal property. We have nothing before us to shew how this was. I only refer to it as furnishing a strong reason for the Courts exercising great caution in interfering. My own view is that it is not possible for the Court to interfere unless it be affirmatively proved that the assessment was one



which was wholly beyond the jurisdiction of the assessor. If it was, I quite agree that the plaintiffs were not bound to appeal, because they could treat the act as void.

The sole question to my mind is, had the assessor jurisdiction to assess? if he had the assessment is valid because not reversed on appeal.

Now it is not disputed that the Insurance Company were resident within the municipality, and had personal property. The case is *primâ facie* brought within the statute, the assessment is on its face good, and the jurisdiction attaches. Whether that *primâ facie* case can be answered by shewing that the money can in no sense be regarded as profits, but as money raised to meet losses under the policies, and for that purpose alone is matter, in my opinion, to be determined by the Court of Revision or County Judge on appeal made.

If the fact were admitted or it appeared to the Court of Revision that the assessment had been made upon property outside the limits of the municipality, that would have shewn that *ab initio* the assessor and the appellate tribunals had been dealing with something wholly beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing.

In *McCarrall v. Watkins*, 19 U. C. R., 248, the late Sir John Robinson, delivering the judgment of the Queen's Bench, held that although the person assessed was not the owner of the property for which he was assessed the only remedy was by appeal, and when we regard the very serious consequences likely to result from allowing the roll as finally revised to be subsequently interfered with, a very strong case is made for confining the action of the Courts to cases where the Act was *ab initio* null and void, as I think was the intention of the legislature in these matters.

In *Nickle v. Douglas*, 37 U. C. R. 51, the two cases of *Marshall v. Pitman*, 9 Bing. 955, and *Bristol v. Wait*, 1 A. & E. 264, 280, are contrasted and the distinction pointed out which seems to me to underlie and reconcile all the cases which at the first blush would appear to be contradictory.

In the first of these cases the party assessed was an inhabitant residing and possessing personal property within the parish. Such property was *primâ facie* ratable. If it was unfairly rated, or if there was no profit from it so that under the statute of Elizabeth no rate should be levied that was a matter for appeal, and appeal only, but in the latter case the rate was imposed in respect of land which the assessors had no power to make. It was said to be like a rate on land situate in a different parish, which would be an illegal rate which the Justices had no power to confirm.

On the whole I have come to the conclusion that the Courts have no jurisdiction to interfere, and that the learned Judge below rightly so decided.

The appeal should therefore be dismissed with costs.

PATTERSON, J. A.—If the ground upon which this appeal has been pressed on the part of the plaintiffs were as well founded in fact as they have assumed it to be, I do not think I should find much difficulty in deciding in their favor.

They urge that the money for which they are assessed as income, is money raised ratably from policy holders who have given premium notes on the mutual insurance principle, for the purpose of paying losses.

Under the method in use by mutual insurance companies when first established in the province, the assessment to pay a loss was not made till after the loss occurred, and was computed according to the amount of the loss.

There was little or nothing in the original constitution of the companies to bring them into the class of trading corporations. The company was simply an organization of property owners who agreed to bear pro rata whatever loss by fire was sustained by any one of their number, and the corporate functions were merely those of an agent employed to superintend the working of the scheme.

The contention of the plaintiffs is that what they now do does not differ in principle or effect from the original system, and that they merely assess in anticipation of

losses for convenience sake, and have the money for the purpose of paying the losses when they happen, and for no other purpose.

If this was the admitted state of the facts, I should not have much hesitation in holding that the money was not income, taking income to mean profit as held by the Judicial Committee of the Privy Council in *Lawless v. Sullivan*, 6 App. Cas. 373, under a cognate statute.

I should also think that, there being no dispute as to the source from whence the money came or the purpose for which it was held—in short, no disputed fact—the question whether it was or was not taxable as income was one of law, and was not concluded by the decision of the County Judge under the Assessment Act, but was essentially of the character of the questions entertained by the courts in such cases as the *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168 ; *London v. Great Western R. W. Co.* 17 U. C. R. 262 ; *Scragg v. London*, 26 U. C. R. 263 ; 28 U. C. R. 457 ; *Nickle v. Douglas*, 35 U. C. R. 126 ; 37 U. C. R. 51 ; *Toronto Street R. W. Co. v. Fleming*, 37 U. C. R. 116 ; *Leprohon v. Ottawa*, 40 U. C. R. 478 ; 2 A. R. 522.

But I cannot find that this presentation of the facts is well founded.

The assessment complained of is upon \$26,660.53 in the year 1884 as income.

The plaintiffs in their statement of claim, after giving some information touching their system of assessing the premium notes, tell us that :

“7. The re-insurance fund of the plaintiffs in the year 1883 amounted to \$242,998.31 and in 1884 was \$269,659.84, an increase of \$26,660.53, but this was an increase in the plaintiffs’ liabilities, yet the defendants claimed that the said amount represented the plaintiffs’ income for the year 1884, and wrongfully assessed them upon the same, and claimed \$590.52 municipal taxes thereon.”

They do not explain what is meant by the term “re-insurance fund,” and I have been unable to find from the materials supplied to us any explanation which enabled me to say that the sum of \$26,660.53, which the municipal

assessor called income, was not income or profits, or that it was merely, or to any extent, composed of money levied by assessment of the notes.

The company was incorporated as the County of Middlesex Mutual Fire Insurance Company, under the general law as contained in C. S. U. C. ch. 52, which embodied several innovations upon and additions to the mutual insurance system as originally established in Upper Canada by 6 Wm. IV. ch. 18.

I had occasion to refer to the changes undergone by our mutual insurance system, or the system which retains the name of mutual insurance, in *Ballagh v. Royal Mutual Fire Insurance Co.*, 5 A. R. 87, 101; and they were more fully described by my brother Burton in *Duff v. Canadian Mutual Insurance Co.*, 6 A. R. 238, 242.

The company now before us has not been content to work under the general law alone, but has obtained special legislation, and its present contention is based upon some provisions of one of its special Acts which are set out at length in the statement of claim.

The statute of the old province of Canada, 27 Vict. ch. 52, passed in 1863, changed the name of the company to The Agricultural Mutual Assurance Association of Canada; and, amongst other extensions of its powers, provided that the company might issue policies and collect premiums in cash for insurance for terms of one, two or three years, as well as policies with a premium note.

It also provided, by section 3, for the establishment of a guarantee or equalization fund not to exceed \$25,000; and by section 4, enacted that the premium notes of the company might be assessed in such manner and at such times as should appear most expedient to the directors; provided always that the sum to be paid by each member should be in proportion to his premium note, and should not exceed seventy-five cents for the three year's risk on the hundred dollars insured on isolated ordinary farm property of the safest description, until the whole guarantee or equalization fund should be wholly exhausted.



Then, fifteen years later, the Act of the Dominion Parliament, 41 Vict. ch. 40, was obtained by the company. It made a second change in the name, which became the London Mutual Fire Insurance Company of Canada; and also made a number of provisions with the object of further extending the powers of the company, or at all events of varying them.

The power to effect insurances for cash premiums was reenacted by section 27, with some modifications, one being the limitation of the amount during any one year to two-thirds of the amount still payable in respect of premium notes on hand on the thirty-first day of December of the previous year.

The business of fire insurance on the cash principle I understand to be the same, whether conducted by a stock company or by a company called a mutual insurance company. It is conducted for the benefit and profit of the members of the company, whether the membership is created by the holding of stock or the holding of a premium note policy; and the member receives his share of the profits whether he gets it as a dividend on his stock or as a provision for losses that would otherwise fall upon the premium notes.

I find nothing in the statutes to distinguish this cash premium business from any other cash premium insurance.

There are, it is true, some things in the company's special Act which I do not think I quite understand. For example, there is in section 3 a declaration concerning the execution of policies which are to be binding on the company; and in section 28 there is another direction which differs from the former. These are puzzling provisions, but they seem to apply to all policies alike and do not touch the question of the cash business.

Then there is section 42, the one set out in the statement of claim and so much relied on. It begins by stating its purpose: "For the purpose of keeping down, if possible, the assessment which the company may now by law make." That we have seen was, and had been for the previous

fifteen years, seventy-five cents on one hundred dollars of insurance on the best class of risks. The purpose was to keep that down, and the section proceeds :

“So as not to exceed the sum of one dollar on each hundred dollars assured should a disastrous year or series of such years occur, and to provide for the speedy and certain payment of losses incurred, the company may raise from any savings they may be able to effect in favorable years out of the assessment collected on the premium notes of the company, while such collection does not exceed one dollar on each hundred dollars on isolated farm property or detached buildings for three years, a guarantee or equalization fund not to exceed fifty thousand dollars, and the said fund and all the interest that may accrue thereon shall belong to the said company, and shall be applied for the purpose mentioned in the commencement of this section, and when not required for such purposes shall be applicable for the payment of any losses, debts and expenses of the company.”

The reference to the inverted process of bringing seventy-five cents down to a dollar probably arose from heedlessly copying the language of the third section of the Act of 1863, where the phrase “the assessment which the company may now by law make,” had a different meaning, and the intention may be taken to be to authorise the laying by for emergencies whatever might be saved out of assessments, not exceeding in any year one per cent of the amount insured, so long as the fund was not over \$50,000. That is consistent with the position taken on the argument that all the money raised by the assessment of the premium notes was to go to pay losses, though it might not all be required for the losses of the particular year ; but it does not go far towards proving that that is what the so-called reinsurance fund is composed of.

The evidence on the subject of this fund is that given by Mr. Vining, the accountant of the company. It is thus reported :

*Mr. Cameron*—Q. There is a fund here called a reinsurance fund. This is your report for 1884. On page one, of that report, under the head of “financial statement,” I find

this stated : " A full statement of the finances of the company will be found annexed. It will be seen by reference to the capital account, that the available assets of the company have increased from \$331,741.52 at the end of 1883, to the sum of \$365, 541 32 on 31st December 1884. And the reserve fund for reinsurance is now \$269,659.84 as compared with \$242,998.31 at the last annual statement." A. Yes.

Q. Now I want you to explain to his Lordship what that reinsurance fund is? what it represents? whether it can possibly represent income? A. The re-insurance fund is made up of assets of the company including the amount of premium notes and the balance uncollected on premium notes. Never have been assessed, never will be assessed. The Government require that we have on hand one-sixth the first year and one-half the second.

*His Lordship.* You say that represents the balance unpaid of the premium notes.

Q. The premium notes extend over how many years? A. Three years, The premium notes for 1882, 1883, and 1884; we have to take the total cash premiums for 1882, and the total amount of premium notes for 1882, less what has expired and been cancelled, and on that we have to show that we have a sixth of the total amount of the premium notes, which is taken as an asset—a sixth of the total amount of cash collected in that year.

*Meredith, Q. C.* As a reserve fund to meet losses.

*Witness.* As a reserve fund to reinsure.

*His Lordship.* One-sixth of the whole? A. Of the whole amount of cash, of the total premiums of 1882. At the end of 1884, 1882 has one year to run, or expires in 1885. Then there is 1883 the same way; the total cash received and the total amount of premium notes; and we have to show the one-half of that on hand at the end of 1884. On 1884, cash system, premium note system, we have to shew five-sixths of 1884. That forms the re-insurance fund. We have to show that to the Government as a liability,

*Meredith Q. C.* That is practically what, according to that scale, would reinsure all the risks.

*Witness*—That is the meaning of it. This reinsurance fund increases every year as our business increases. Apparently they have assessed us on a liability instead of an asset.

Q. Your liability increases as the volume of your business increases? A. Yes.

Q. This reinsurance fund is treated as a possible liability? A. Yes.

Q Unless you showed that amount you would not be solvent? A. We would not be allowed to do business.

I have to confess that even this exposition leaves me without a clear idea of what this reinsurance fund consists of. I cannot make it out from the capital account, and I am not helped by reading the Insurance Acts of 1875 and 1877, or ch. 124 of R. S. C., where premiums and premium notes received are required to be shewn as assets or as income.

It may not be composed either wholly or in part of money received from cash premiums; but it is impossible to say from the evidence that it is not composed of income from that source; and, from the circumstances mentioned in the evidence that the receipts from the cash insurance are not kept in the books of the company distinct from those from premium notes, I suppose nothing more on the subject can be shewn.

At all events it would be an inquiry into facts proper for the Court of Revision and the County Judge, but not for this court.

I think we should dismiss the appeal on the same ground on which the action was dismissed in the Court below—namely, that the case, as it comes before the Court, is not one in which the decision of the County Judge is reviewable.

OSLER, J. A.—I am of opinion that the decision of the County Judge was final under the circumstances. The place of business of the company is in London, and the assessor therefore had jurisdiction to assess them. If they were assessed for too large a sum, their remedy was by appeal to the Court of Revision and the County Judge. That was and is the substantial objection to the assessment. The property assessed was there; the plaintiffs say it was not income, and that it was exempt on some ground which they have not very clearly explained. But it is certainly



not exempt merely on the ground that it was there to meet future claims which *may* never arise, though they very probably will. It seems to me not to differ in character from so much money in a bank, or other property liable to taxation.

I agree that the appeal must be dismissed.

*Appeal dismissed, with costs.*

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PIPER V. HARRIS MANUFACTURING COMPANY.

*Duress per minas—Trover—Acquiescence.*

The plaintiff being an agent for the defendants, an agricultural manufacturing company, sold to one S. a mowing machine for \$52, taking in exchange a horse, notwithstanding his instructions were to sell for cash only. The company, however, adopted the sale by accepting from the plaintiff a chattel mortgage on the horse for their claim. Shortly afterwards the defendants becoming dissatisfied, C. their general agent proposed to S. to return the mower and receive back the horse. This being agreed to, C. saw the plaintiff and informed him that he was authorised to take back the horse to S. and urged plaintiff to do so himself or allow him (C.) to do so.

S. at first objected, but on being threatened "with an action," he consented, and lent C. a horse and buggy, and also a halter so as to lead the horse away. Subsequently, on the same day, the plaintiff, when informed that the horse had been returned to S., told C. that he had no right to take back the horse, alleging that he was worth \$95, for which sum he brought this action against the defendants.

At the trial the jury found that the horse had been taken away against the will of the plaintiff, and under a threat of criminal proceedings, and judgment was given in favor of the plaintiff for \$85, as being the value of the horse. The County Judge refused to set aside such judgment and findings.

*Held*, that there was no evidence of duress by threats, sufficient to avoid the plaintiff's consent to return the horse to S.

The law as to duress by threats of imprisonment considered.

Judgment of Court below reversed.

THIS was an appeal by the defendants from the County Court of the county of Ontario, and came on for hearing before this Court, on the 20th of September, 1888.\*

The action was in trover for a horse under the following circumstances: The plaintiff was agent of the defendants for the sale of agricultural implements, and in June,

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

1885, sold a mowing machine to one Shand for the price of \$52. Instead of selling for cash he took in exchange the horse in question. This was contrary to the instructions of his employers, but in this particular instance they affirmed what he had done by taking from him a chattel mortgage on the horse for the price of the mower. The mortgage was not registered, and was said to have been lost. They soon afterwards became dissatisfied with their security, and their general agent, one Cody, proposed to Shand that he should return the mower and take back the horse. Cody went to the plaintiff, told him that he was authorized to take back the horse to Shand, and urged him either to do so himself or to let him, Cody, do so. The plaintiff was at first unwilling, but on being threatened, as he said, "with an action," he gave it up to Cody, lending him also another horse and buggy and a halter for the purpose of leading away the animal in question. Cody returned the horse to Shand, and in the afternoon of the same day told the plaintiff of it, saying it was a good job he had done so as the horse was not worth more than \$50. Plaintiff said it was worth \$95, and that he had no right to take it back. It appeared that a criminal charge of some kind was then pending against the plaintiff on the prosecution of another manufacturing company of which he was the agent, and the plaintiff said that he understood that in threatening to take action against him Cody meant to threaten him with a criminal proceeding similar to that (whatever it was) which had been taken in the other case. He swore that he gave up the horse in consequence of the threat, considering that even if the defendants had no right to take the proceeding, it would injure him in the other case. He was not afraid of personal violence, or of the horse being taken by force.

In answer to a question put by the learned Judge the jury found that Cody had taken away the horse against the will of the plaintiff under a threat of criminal proceedings, and judgment was given for \$85, the value of the horse.

A rule nisi to set aside the findings and judgment was afterwards discharged.

*Ritchie*, Q. C., for the appellants.

*Paterson*, Q. C., for the respondent.

November 13, 1888 The judgment of the Court was delivered by OSLER, J.A.

The least measure of relief to which the defendants are entitled is to have the judgment reduced by the amount due on their chattel mortgage, as the difference between that sum and the value of the horse is the proper measure of the plaintiff's interest: *Brierly v. Kendall*, 17 Q. B. 937.

But upon the evidence we are of opinion that the appeal should be allowed, and the action dismissed altogether. The plaintiff admits that he gave up the horse to Cody to be returned to Shand, and that he even aided him in doing so by lending him a horse and buggy and a halter to lead the other horse away. He knew that the purpose of this was to undo the transaction between Shand and himself by which he had acquired the horse, and that the effect would be to discharge him from any personal liability to the defendants. He now asserts that he gave the horse up against his will and under duress of the threat made against him by Cody.

I think that there was no evidence for the jury of any such duress *per minas* as the law recognizes as sufficient to avoid the act which the plaintiff was a party to.

"For menaces, in four instances, a man may avoid his own act: 1. For fear of loss of life; 2. Of loss of member; 3. Of mayhem; and 4. Of imprisonment:" *Bac. Abr.* Duress, citing *Co. 2nd Inst.* p. 283.

"At common law the coercion which will be sufficient for avoiding a contract may consist in duress or menace. In modern books the term duress is used to include both species. It is said there must be some threatening of life, or member, or of imprisonment, or some imprisonment, or

beating itself, &c. And a threat of imprisonment is not duress unless the imprisonment would be unlawful": *Pollock on Contracts*, 553-4.

The threat sworn to by the plaintiff is extremely vague, but taking his interpretation of its meaning to be justified by what Cody said it is not to be magnified into a threat of imprisonment. There was no warrant: no immediate imprisonment was possible, nor could there have been caused by what was said a reasonably grounded fear of restraint of liberty. I think the law is well stated in *Harmon v. Harmon*, 61 Me. 227.

"A threat of prosecution simply before the commencement of any legal proceedings does not necessarily include an arrest. It is no more than an assertion that the proper steps will be taken to institute legal process, which may or may not result in an arrest of the person. And whether the process is to be initiated before the magistrate or a grand jury the law so shields it by the oath of the complainant and witnesses, as well as the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness."

In this case what operated on the plaintiff's mind most probably was that the proceeding he supposed Cody to hint at, or any proceeding at the instance of the defendants, might prejudice him in the pending criminal charge on the prosecution of his other principals, but this in my judgment, is not enough to avoid a consent given and acted upon in the manner he describes.

The cases of *Rex v. Southerton*, 6 East. 126; *Cumming v. Ince*, 11 Q. B. D. 112; *Biffin v. Bignett*, 7 H. & N. 877; *Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 336, may be referred to.

If the defendants had merely obtained the horse for their own use, and kept it, the question might have arisen whether the transaction could be set aside, not on the ground of duress, but as having been brought about by undue pressure, or as being based wholly or in part upon



an illegal consideration, viz., the compromise or abandonment of criminal proceedings: *Lounds v. Grimwade*, 59 L. T. N. S. 168; 39 Ch. D. 605. Here there was no evidence of duress, and the defendants merely disposed of the horse without gaining any advantage for themselves, in the way the plaintiff authorised them to do it.

On the plaintiff's own shewing we think the appeal should be allowed, and the action dismissed with costs.

*Appeal allowed, with costs.*

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## DIXON V. THE RICHELIEU NAVIGATION COMPANY.

*Carriers of passengers—Negligence—Special contract—Personal baggage—Commercial traveller's baggage—"Owner's risk against all casualties"*

The defendants, who were carriers by water of passengers and goods, made a special contract with the Commercial Travellers' Association for the season of 1885, by which members of the Association were entitled to receive tickets for passage at a reduced rate of fare upon certain conditions, one of which was expressed thus : "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties."

*Held*, upon the evidence that the agreement had been continued for, and was binding during the period of 1886.

In July, 1886, the plaintiff D., a commercial traveller for a jeweller's firm, received a ticket upon the above condition for passage from Montreal to Toronto. He took on board with him three trunks, known as commercial travellers' trunks, exceeding the allowed weight, containing jewellery, jeweller's tools, and other valuables, the whole comprising the usual outfit of a traveller for a jewellery house, and valued at about \$15,000. The jury found that the trunks did not contain personal baggage but goods and merchandise, and that they were received by the defendants with knowledge of that fact.

The property was damaged by the negligence of the defendants, but they contended that they were relieved from all liability by the conditions of carriage.

*Held*, [OSLER, J. A., dissenting], (1) that the terms of the condition protected the defendants from all liability for negligence. The words "against all casualties" were merely intended to extend the meaning of the term "owner's risk" to all possible contingencies other than wilful misconduct on the part of the defendants.

(2) The goods, though in one sense merchandise were to be treated as the personal baggage of a person in the position of the plaintiff travelling with samples in the course of his business.

*Per* OSLER, J. A. (1). The property was not personal baggage, such as a passenger was permitted to take with him without extra charge, but was commercial travellers' baggage or merchandise which the company would have been entitled to charge for, and for the loss of which, even in the absence of conditions, they would not have been liable, as *personal baggage*, either at common law, or under the Act respecting carriers by water. 37 Vict. ch. 25, sec. 2.

(2). That whatever might be the meaning to be attributed to "owner's risk" standing alone, the other part of the condition "against all casualties," qualified it by limiting the risk assumed by the owner to *accidents*, which would not include a loss caused by the negligence of the defendants.

*Lewis v. Great Western R. Co.*, 3 Q. B. D., 195; *Fitzgerald v. The Grand Trunk R. Co.*, 4 A. R. 601; *Wilson v. Xantho*, 12 App. Cas. 503, considered.

The judgment of the Q. B. D. and of the trial Judge reversed.

This was an appeal from the judgment of the Common Pleas Division, affirming the judgment of Rose, J., at the trial on the findings of the jury in favor of the plaintiffs.

The plaintiff Dixon was a commercial traveller for a firm of jewellers, the other plaintiffs, and the defendants were common carriers by water of passengers and goods.

The other facts appear clearly in the judgments.

The appeal came on for hearing before this Court on the 19th and 20th of April, 1888.

*McMichael*, Q. C., and *McCarthy*, Q. C., for the appellants.  
*Robinson*, Q. C. and *T. P. Galt*, for the respondents.

May 8, 1888. HAGARTY, C.J.O.—I think the agreement made in 1885 was existing and binding in 1886 on the evidence in this case.

I also think that the plaintiff cannot be heard asserting that the three trunks that were damaged were not baggage, but merchandise not affected by the terms of the special contract of carriage.

The agreement with the Commercial Travellers Association, and the provision about baggage must be understood in reference to the well known course of dealing with such persons, and their habit of carrying such samples, &c.

Allowing this class of people to carry "baggage" with them on the reduced fare, to the large amount of 300 pounds weight, indicates pretty strongly that the words used must have been intended to cover the usual things carried about by them on their professional journeys.

He came on board the steamer claiming the benefit to which he was entitled as a commercial traveller.

He produced his ticket as such traveller, and under it paid the reduced fare, and received the usual passenger's ticket. He had three trunks and three valises; he took two smaller valises to his stateroom, and took his passenger's ticket to the baggage-man, and asked to have the others checked and he received a check for each of them.

He says: "I presented my check and asked him to check my trunks. When he checked them, I asked if they would be perfectly safe there, he said that they would as he was usually round."

*\*Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

Any person conversant with steamboat travelling must see that these articles were all treated by the owner in the ordinary way as personal baggage checked and given in charge to the baggageman.

I agree that the fact of their being in excess of the stipulated weight cannot help the plaintiff.

It seems conceded that the words "owner's risk" alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay.

Such cases as *McCawley v. Furness R. W. Co.*, L. R. 8 Q. B. 57; and *Gallin v. London & N. R. W. Co.*, L. R. 10 Q. B. 212; *Robinson v. Great Western R. W. Co.*, 35 L. J. C. P. 123; *D'Arc v. London & N. R. W. Co.*, L. R. 9 C. P. 325 are express.

Here the parties add the words, "against all casualties."

The plaintiffs' argument is that this addition destroys the protection of the simple words "owner's risk."

There can be no pretence that such words were ever used with any such intention, but on the contrary the idea must have been to strengthen instead of destroying the exemption from liability.

The added words may be translated, "as to everything that may happen."

I would feel it almost as a misfortune to be obliged to give a meaning to words wholly different from that of their universal acceptance.

When a man agrees for a good consideration to say, "I will be at the risk of anything that may happen to these goods of mine," I think he must understand that everything not caused by design is included in his risk—and unless compelled by the force of a direct authority, I am unwilling to force on parties an interpretation of their words, unwarranted, as I believe, by any fair or reasonable construction.

I think there is an intelligible distinction between this contract, and the contracts on bills of lading, discussed in such cases as *The Xantho* (12 Ap. Cas. 503) and the overruled case of *Woodley v. Mitchell*, 11 Q. B. D. 47. They



dealt with such words as "perils of the sea," "dangers and accidents of the sea," and the result is, that such an exception as to the carrier's liability does not excuse the latter when the damage arises from collision by the negligent management of the carrying ship.

Here we have not to deal with similar words, but "owner's risk against all casualties."

The first two words, it is conceded, standing alone protect the carrier in a case like this.

I am of opinion that the three words added do not, as is urged, wholly destroy the protection given by the first two.

Assuming that under the evidence it is not allowable to the plaintiff to insist that these three trunks are not to be considered his baggage, the statute 37 Vict. ch. 25, (D) appears to limit the responsibility to \$500, and further that they are not to be answerable for damage to gold, silver, watches, jewels, or articles of great value, not being ordinary merchandise, unless the true nature and value had been declared by the shipper to the carrier, and entered on the bill of lading or otherwise in writing.

I think the appeal must be allowed, and the plaintiff's action dismissed.

BURTON, J. A.—The plaintiff sued the Navigation Company as common carriers, alleging not only a failure to carry himself and certain merchandise belonging to him safely, but also that the injury and damage arose from the actual fault, carelessness, and negligence of the company.

The defendants denied the contract, and also alleged that the goods were merchandise of a peculiar character and of higher value than ordinary and common merchandise, and that no notice was given to them of their value.

That the plaintiff brought the same on board as his own luggage and took care of them himself and knew how they were placed and handled, and that he made no request that any peculiar care should be taken of them.

That had the company known the character and value of the goods they would not have consented to take them

on board except on payment of the proper charge, the plaintiff having paid only the fare which a passenger with ordinary luggage would pay.

And that the goods were carried at the plaintiff's own risk.

The plaintiff then amended his claim by making P. W. Ellis & Co., a firm of jewellers, co-plaintiffs, alleging himself to be a commercial traveller in their employ.

The only portion of the amended claim material to be noticed is that the added plaintiffs allege the contract of carriage in the same terms except that they refer to the goods as "certain merchandise and personal baggage, in his possession, and they allege that the defendants received the said merchandise and personal luggage well knowing that the merchandise was such. They also claim that,

"10. In case the Court should be of opinion that the plaintiff, William Arthur Dixon is not entitled to recover in this action in respect of the said merchandise, the said P. W. Ellis & Co. claim that they are entitled to recover, in respect of the same, the said merchandise having been delivered to the said defendants as common carriers for reward to the defendants who received the said merchandise, well knowing that it was such, and the said plaintiff's claim that the damage to the said merchandise arose in consequence of the breach of duty, default, carelessness, and negligence of the defendants, their servants and employees."

The defendants to this amended statement of claim of the added plaintiffs in addition to a denial of the contract alleged, plead that Dixon, their commercial traveller, was a member of an association called the Commercial Travellers' Association, and that he was carried under a special contract made with that association at a reduced rate on condition that they were not to be liable for loss or injury either to merchandise or personal baggage.

The plaintiffs failed to prove any such contract as that alleged, and the defendants were entitled to have the action dismissed unless the plaintiffs applied for and obtained permission to amend, and it is, I think much to be regretted that that course had not been adopted as the plain-

tiffs declined to amend. The plaintiffs would no doubt upon an intimation of that kind have amended, and if that course had been adopted much of the confusion and misapprehension which have arisen would have been avoided. Among others the evident misapprehension of the Chief Justice as to the arrangement between the association and the defendants not being in force in 1886.

The case was contested at the trial as if all parties assumed that arrangement to exist in as binding a manner as it had ever existed: whether it was one which either of the contracting parties could have enforced against the other, if that other had refused to be longer bound by it is another matter, and is for the purposes of this suit quite immaterial. It was at the time the plaintiff made his contract for carriage with the company recognised by both parties, and the plaintiff availed himself of the privilege of being carried at the reduced rate.

The plaintiff admits he knew there were conditions of some kind, and he therefore knew that the defendants were agreeing to carry him at a reduced rate relying upon those conditions.

The defendants entered into no contract except that referred to in the conditions, viz :

That they would carry members of the Association at 20 % under the regular fare, with an allowance of 300 lbs. of baggage free, but this baggage to be at the owner's risk against all casualties.

The goods in question, though in a sense merchandise, may well be treated as the baggage of a person in the position of the plaintiff travelling about with samples in the course of his business; he procured checks from the servants of the company, as for ordinary commercial travellers' baggage, and although it was in excess of what he was entitled to have carried in that way that was a matter which the carrier could waive, and it is not one of which he can be heard to complain; to the extent of the excess they might have made an extra charge, and they would by doing so have also assumed the liability for damage to the

merchandise thus charged for, but if the passenger under such an agreement as this chooses to exceed the limit, and the company do not object he cannot be allowed afterwards to say, to the extent to which you good naturedly consented to carry in excess of the 300 lbs. I will now hold you responsible as common carriers.

If the goods in excess of the 300 lbs. could be regarded not as baggage, but ordinary merchandise for which the company would be entitled to make a charge, it would be fraud upon them to conceal that fact, and omit to pay the charge, and he cannot claim to be compensated in respect of any loss or injury by the company to whom he has abstained from giving notice of the contents of the box. In such a case he carries at his own risk.

I quite concede that in the absence of express stipulation, a person carrying trunks which contain merchandise or samples of merchandise as personal luggage would in the event of loss have no claim against the company, and if the plaintiffs place their claim on that ground they are, I think, out of Court, but I think that the evidence of the course of dealing between these parties shows that what they intended to contract about was commercial travellers' baggage, and that it differs therefore from the ordinary case.

Great difficulty has been experienced from time to time in defining what is meant by personal luggage—it is not confined to mere wearing apparel, or things carried for use on a journey, and in one work of authority it is laid down thus: "All articles which it is usual for persons travelling to carry with them, whether from necessity, convenience, or amusement (such as a gun or fishing tackle), fall within the term baggage."

And Chief Justice Cockburn, in the course of his judgment in *Macrow v. The Great Western R. W. Co.*, (L. R. 6 Q. B. 612,) commenting upon a definition of Mr. Justice Story, says: "It seems to us, however, a misapprehension to suppose that he intended to say that ordinary passengers' luggage comprehended only that which was common to all passengers. We believe him to have used the term 'usually'



relatively to the habits and wants of the different sorts and classes of travellers."

The parties here were manifestly not stipulating in respect of wearing apparel or those things which are usually included within the term "personal baggage," but were all well aware of the nature of the baggage carried about by persons following the occupation of the plaintiff Dixon, and which has come to be popularly known as "commercial travellers' baggage," and which was checked as such. I am, therefore, of opinion that the plaintiffs must stand or fall upon this as personal baggage.

I do not think the findings of the jury stand in the way of our so holding.

In *Macrow v. The Great Western R. W. Co.*, the jury found the goods to be personal baggage, but the Court held as a matter of law that certain things included in that finding were not personal luggage.

If, upon the evidence in this case it would be the duty of the Judge to instruct the jury that this came within the definition of "commercial travellers' baggage," there could be no object in submitting the question to another jury.

If then this was baggage, and the plaintiff took advantage of the contract to have himself and it carried at a reduced fare, what is the proper construction of that contract?

The cases fully establish that the words "owner's risk" protect the defendants from all liabilities, except wilful misconduct, but it is said that the addition thereto of "against all casualties" leave them in fact as they were without any condition or protection at all except the protection given by the statute. That such a construction could never have been intended must be obvious, and I should require very strong authorities for such a construction before adopting it.

I do not think the case of *Phillips v. Clark* 2 C. B. N. S. 164), is any authority for such a construction—there the stipulation was, that the shipowner was not accountable "for leakage or breakage," and it was held that inasmuch

as it could not be presumed that the defendant who was under an obligation to carry the goods safely, and who would under ordinary circumstances be liable for breakage and leakage, stipulated for anything more than that he should be exempted from the liability which the law would otherwise cast upon him, but if in such a case, in consideration of a reduced charge, the stipulation had been "not accountable for leakage or breakage however caused," the case would be more like the present.

The Court there was merely construing the particular contract.

I agree that the words "owner's risk" might, as suggested on the argument, be controlled by the addition for instance, of the words against fire. I think the proper construction would be that was the only risk which the owner took upon himself, but that is a very different thing from the words used here, "against all casualties," they must, I think, be held to and were intended to extend the meaning to all possible contingencies except wilful misconduct on the part of the defendants or their servants and I do not think we can gain much assistance from those cases which were cited to shew that in a bill of lading the shipowner is liable, notwithstanding an exception of perils of the sea, if the loss through perils of the sea was caused by the previous default of the shipowner.

I think, therefore, that the appeal should be allowed, and the action dismissed.

PATTERSON, J.A., concurred.

OSLER, J. A.—The plaintiffs sue for damage to goods delivered to the defendants for carriage from Montreal to Toronto on the 31st July, 1886. The goods consisted of jewellery and watches and watch materials and jewellers tools to the value of \$15,000, contained in three large trunks described as "commercial trunks," and were said to be the usual outfit or equipment of a traveller for a jeweller's firm to the value of \$15,000.

In entering the Cornwall canal the defendants' steam-boat collided with the end of one of the piers, the result being that the hull was stove in, the boat sank, and the plaintiff's goods were much damaged by water. The jury found that the accident was owing to the negligence of the defendants, and on a careful examination of the evidence I am satisfied that we cannot disturb that finding.

There is evidence to support the conclusion that if the vessel had been navigated with ordinary care and skill, she should have been brought up to the canal, and should have entered it in such a way that the accident could not have happened. Assuming that the conditions of carriage were such as to make proof of negligence necessary, and that mere proof of injury to the goods is not sufficient to charge the defendants, the case is covered by *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14, and, to use the language of Bovill, C. J., "if the goods are damaged and no reasonable explanation of the damage can be given, except the negligence of the defendants, the jury are justified in finding that such negligence is proved."

The principal questions argued were, 1. Whether the plaintiff and his goods were received and carried on a special contract, and 2. If so, to what extent, if at all, the defendants were by the terms of such contract relieved from responsibility in the event which happened.

There was also a question as to the extent of the defendants' liability under the "Act respecting Carriers by Water," 37 Vic. ch. 25; section 2 of which provides that such carriers shall be liable for the loss of or damage to the personal baggage of passengers by their vessels, &c., provided that such liability shall not extend to any greater amount than \$500, or to the loss of or damage to any of the valuable articles -- gold, silver, watches, &c., -- mentioned in sec. 1, sub-sec. 3, unless the true value of such articles has been declared as provided in that section.

If the property in question is to be treated as personal baggage the amount which the plaintiff would be entitled

to recover is probably very small, as the articles damaged were mostly of the character described in sub-sec. 3, and their value was not declared.

I think that the Act does not assist the defendants, as it appears to me that the property cannot be regarded as *personal* baggage within the well known meaning of that term. It is clear that it was not presented by the plaintiff nor received by the defendants for carriage as such. The 4th and 5th findings of the jury, that the company carried the contents of the boxes as merchandise and assumed that they contained goods and merchandise, dispose of that point, on which indeed there is no room for reasonable doubt, considering the character and appearance of the boxes and the fact that the plaintiff presented himself as a commercial traveller, and as will presently appear received a ticket as such at a reduced rate, which entitled him to carry 300 pounds of "baggage" free.

This was not such personal baggage or luggage as a passenger is entitled to take with him without extra charge, but was "commercial travellers' baggage," as it was called, for the loss of which the carriers would not be responsible as for personal baggage, but which they would have been entitled to charge for, and to insist upon being carried for reward, unless they had conceded to the plaintiff as part of the consideration of the price of his ticket the privilege of having it carried free, which merely means free of extra charge.

The case then turns upon the terms of the special contract, and whether they are such as to exonerate the defendants from the consequences of a loss attributable to their own negligence.

At the trial it appeared that the plaintiff Dixon was a member of an association known as the Commercial Travellers' Association of Canada, holding an annual certificate of membership, which stated that he was entitled to all the rights and privileges which the association might enjoy with railroads, steamboats, &c., until 31st December, 1886. On the back of this certificate were conditions signed by the holder corresponding with those upon a railway pass-



enger's commercial traveller's ticket, but not applicable to steamboats. An arrangement was made for the season of 1885, between the defendants and the association, evidenced by correspondence between Sargant, the secretary of the association, and the defendants' manager and traffic manager, the terms of which, so far as material, are as follows:

"The fares for members of your association will be 20 per cent. under our regular fare, with allowance of 300 pounds of baggage free, but this baggage must be at the owner's risk against all casualties."

In August, 1885, according to the evidence of Sargant, and Milloy, the defendants' traffic manager, it was verbally agreed between the general manager and Sargant that this arrangement should be "continued," as the witnesses expressed it, for the season of 1886. It may be that it would not have been binding if either party had determined to recede from it, but the defendants had acted upon it for that season, and the plaintiff obtained his ticket, and had his baggage checked and carried in pursuance of it on this occasion. He said that he presented his membership certificate to the purser on the boat and obtained a ticket. He did not actually know of any arrangement between the company and the association, but supposed there must be some arrangement, or they (that is, members of the association,) would not get lower rates. It is evident that he presented his certificate in order to get the benefit of any advantage which the company might have agreed to give him, as a commercial traveller; and the purser could have told him, had he chosen to ask, on what terms he was getting the reduced rate.

In such circumstances his ignorance of the terms and conditions on which the company had agreed to receive and transport him and his baggage, would be of no avail to him in case of a loss covered by the conditions.

The judgment of the learned trial Judge proceeded wholly on the ground that the contract "did not free the defendants from (liability for) damage occasioned by casualties which were the result of negligence on their part."

In the Divisional Court the judgment was affirmed on the ground that the limitation of the defendants' liability, though evidently a term of the contract for 1885, was not included in the contract assented to by the association for the season of 1886, because Sargant, the secretary, in reporting to the directors the arrangement he had made that the contract for 1885 should be continued for the following season, had stated it thus : " When in Montreal your secretary called upon Mr. Labelle, General Manager Richelieu and Ontario line of steamers, and arranged for rates for 1886, viz. 20 per cent. off for members and their wives: 300 lbs. baggage free;" omitting to notice the stipulation that baggage was at owners' risk against all casualties.

The report, as noted in the record of the meeting of the association was " read and received."

This point was raised for the first time in shewing cause to the defendant's motion and order nisi ; it was not taken at the trial, which proceeded upon the assumption that the terms for 1886 were the same as those for 1885. No question was left to the jury as to Sargant's authority or as to the agreement actually made by him with the defendants. They were merely asked whether the plaintiff was aware that by the terms of the arrangement the defendants were relieved from liability for damage to baggage, a question which can only be regarded as a formal one, in view of his own admission that he presented his certificate in order to obtain such advantages as under any existing arrangement with the defendants he might be entitled to. It will be seen moreover, that the 6th question left to the jury assumes the existence of a contract to release the defendants from liability for damage to baggage.

I think this objection was not open to the plaintiff after the course taken at the trial. The agreement in fact proved to have been made by Sargant was that the contract then existing should be continued for the next season. His authority to make the contract for 1885 was not questioned, nor is there any evidence that the contract so made

required or had received the assent of the directors. The same official swears that in November, 1886, he met the defendants' traffic manager in Montreal and, "renewed the privileges for 1887." His omission to make an accurate report to the association of the arrangement he made in August, 1885, cannot, I consider, affect the defendants, who acted on the faith of his having authority to make it as he had made the earlier one in May of the same year.

At the most there could only be a new trial on this ground, as there is evidence from which a jury might infer that Sargant had a general authority to make the arrangements he did make, and it is by no means clear that all the evidence capable of being adduced on that point has been exhausted, *e. g.*, how and by whom was the arrangement for 1884 made, &c.

It therefore appears (1) that the goods were carried under the terms of a special contract or upon the special condition that they should be "at the owner's risk against all casualties." (2) That they were not personal baggage (or received as such) in respect of which the liability for loss or damage is limited by statute to \$500, but are to be regarded as goods or merchandise in respect of which the carrier's liability is that imposed upon them by statute of common law, save as varied by the special contract.

The Act already referred to declares that carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance. Provided, that they shall not be liable to any extent whatever to make good loss or damage happening to such goods without their actual fault or privity, or the fault or neglect of their agents, servants, or employees, by reason of (a) fire, or the dangers of navigation, (b) defects in or nature of the goods themselves, armed robbery or other irresistible force, (c) to any gold, silver, or other valuable articles described, by reason of robbery, theft, &c., unless the true value is declared at the time of the delivery for conveyance.

The last clause does not apply, as the goods, though

valuables of the class described and not declared, were not damaged by the excepted perils.

There is nothing in this Act as there is in the Railway Act, to prevent the carriers from stipulating for freedom from liability for their own negligence, nor would there be anything unreasonable in their doing so when they offer a fair alternative rate, or special advantages. But it is to be observed that with us the reasonableness of such a contract is not the test of its validity as in cases arising under the Railway and Canal Traffic Act, 17 and 18 Vict. ch. 31 (Imp.) The carriers and not the court are the sole judges of that, in other words they may insist upon their own terms whether an alternative rate is offered or not.

Apart from special contract the loss in question is one for which, in my opinion, the defendants as common carriers of goods would be responsible as it was not caused by dangers of navigation or other perils excepted by statute. (*Cohen v. South Eastern R. Co.*, 2 Ex. Div. 253; *Bergheim v. The Great Eastern R. Co.*, 3 C P. D. 221, *Schouler* on Bailments, 2nd ed. 672.)

To what then does the stipulation "at the owner's risk against all casualties" extend? The defendants contend that if the exception had simply been "at the owner's risk" a loss caused by their neglect would have been covered, and that the additional words are merely an amplification of that expression, or in *pari materiâ*.

The plaintiffs on the other hand say that even if that would be the construction of the former words standing alone, the addition of the words "against all casualties" qualify the exception and limit it to *casualties*, that is to say accidents, which in the absence of an exception expressly covering loss by negligence is limited to accidents occurring without the defendants' fault.

First, then, as to the meaning of the words "at the owner's risk." This question was very much considered in the case of *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601. The defendants had contracted to carry a quantity of oil on certain conditions, one of which was the oil would



in no circumstances be carried save at the risk of the owners. This was in 1873 prior to the Act which prevented the defendants from contracting themselves out of liability for negligence.

Moss, C. J., after pointing out that such a condition must be construed most strongly against the company and that interpretation adopted which was most favourable to the consignor, said: "My examination of the modern cases has led me to the conclusion that in none of them has it been decided as a pure question of construction that the use of the words, 'at owner's risk' frees the carrier (of goods) from all liability for negligence." He adds that in most of the numerous cases on which he had commented the company had guarded itself against responsibility for loss or damage "however caused," and these words had been emphasised in reading the contract.

See also on this point the observations of Lord Blackburn in *Manchester R. W. Co. v. Brown*, 8 App. Cas. 703, 710.

*Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195, is accurately distinguished in *Fitzgerald's* case on the ground that the expression "owner's risk" had by the course of dealing between the parties acquired a conventional meaning excluding all liability except for wilful misconduct. As Burton, J. A., observed: "here there is no evidence of a previous course of dealing or that the words had between these parties received any conventional meaning."

I notice that in the case of *Stewart v. London and North Western R. W. Co.*, 3 H. & C. 135, which was not cited in the *Fitzgerald Case*, it seems to have been held that the risk of loss by negligence was covered where a passenger had accepted a ticket subject to the condition "luggage under 60 lbs. free at passenger's own risk." This was afterwards overruled, though upon another ground, by *Cohen v. South-Eastern R. W. Co.*, 2 Ch. Div. 253.

I refer also to *D'Arc v. London and North-Western R. W. Co.*, L. R. 9 C. P. 325; *Robinson v. Great Western R. W. Co.*, 35 L. J. C. P. 123, 33 L. J. Ex. 199; *McCann v. London and North-Western R. W. Co.*, 31 L. J. Ex. 65.

But whatever may be the meaning to be attributed to the expression 'owner's risk' standing alone, the latter part of the condition would, in my opinion, qualify the former and limit the risk assumed by the owner to "accidents," a term which, though it may include a loss caused by the negligence of others, does not properly describe one occasioned by the carriers themselves.

We have to deal with the defendants' own language, and I can see no reason for giving it a forced or limited construction in their favor.

The excepted perils are, all casualties—all accidents—and the duty or engagement of the defendants was to use due care and diligence in the safe keeping and conveyance of the goods unless prevented by the excepted perils. Admitting that the immediate cause of the damage in the present case may be described as an accident or casualty, yet if it were brought about by the negligence of the defendants, I find no authority for saying that the exception of accidents or casualties will protect them from liability without further words. There is a long series of decisions which establish the rule that in such a case the carriers are not exempted, the reason being that the loss is really attributable to their own negligence, and not to the accident. These cases are noticed in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601; and in *Grill v. The General Iron Screw Colliery Co.*, L. R. 1 C. P. 600, where the principle on which, in an action on the bill of lading, the negligent shipowner is not protected by the exception of accidents or perils of the sea, although he may be entitled to recover upon a policy of insurance, on the ground that there had been a loss by such perils is thus explained by Willes, J.

"A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because

there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea, is caused by the previous default of the shipowner, he is liable for his breach of contract."

Reading the words "casualties" or "all casualties" for "perils of the sea," in this passage, its application to the case in hand is very close.

It was pressed upon us by the counsel for the defendants that these cases had been in effect over-ruled or their principle disapproved of by the House of Lords in the recent case of *Wilson v. The Xantho*, 12 App. Cas. 503, and much reliance was placed upon an observation of Lord Herschell, that he was unable to concur in the view that a disaster which happened from the fault of somebody, could alone be an *accident or peril of the sea*; and it was argued that even an accident caused by the carrier's negligence would therefore be within the exception. It is evident that Lord Herschell's remark was directed, not to the case of an accident caused by the *carrier's* negligence, but to an injury suffered by him in consequence of the negligence of somebody else. The court below had followed the case of *Woodley v. Michell*, 11 Q. B. D. 47, an action upon a bill of lading which contained an exception of "perils of the sea." A collision occurred and consequent loss, and it was held that although the collision was not caused by the negligence of the carrying ship, yet that where it was brought about by the negligence of either of the vessels it was not a peril or accident of the sea within the meaning of that exception in the bill of lading. The court followed a dictum of the Master of the Rolls in *The Chartered Mercantile Bank v. The Netherlands Steam Navigation Co.*, 10 Q. B. D. 521, that a collision caused, not by the fault of the carrying vessel, but by that of those conducting the other ship, could not be called an

accident within the exception of accidents or perils of the sea, as an accident was that which happened without the fault of anybody, and therefore a collision which was the fault of somebody could not be called an accident of the sea.

*Woodley v. Michell* was overruled by the House of Lords in *The Xantho*, in which the point decided was that "foundering caused by collision with another vessel is within the exception, 'dangers and accidents of the sea,' in a bill of lading, and excuses the ship owner if it occurs *without fault in the carrying ship*." The view of Willes, J., above quoted, is expressly approved and the following passage from the judgment of Lord Macnaghten, p. 517, shews that it was not intended to throw the slightest doubt on the previous decisions, which had already been approved of in *Manchester R. W. Co. v. Brown*, 8 App. Cas. 703. He says, "If the accident is brought about by the negligence of the owner of the carrying ship, or his servants, it would be contrary to common sense, and sound principle, to allow one who was the author of the mischief to avail himself of his own wrong."

Upon the whole it appears to me that the judgment at the trial was right, and that the appeal should be dismissed.

*The plaintiffs had leave to amend their pleading,  
and the appeal was allowed with costs.*

OSLER, J. A., dissenting.

[This case has been carried to the Supreme Court.]

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## STEELE V. YORK.

*Yonge street—Liability of the County of York for accidents not occurring on the macadamized toll road.*

The macadamized toll road known as Yonge street, formerly a provincial public work, was, in 1855, by Act of the Legislature and order in Council, vested in and acquired by the county of York. The order in Council described it as "the macadamized toll road running northerly from the liberties of the city of Toronto to the village of St. Albans (Holland Landing), known as Yonge street or the North Toronto Road to Holland Landing," etc.

One of the conditions of sale was that the road should be kept in thorough repair by the county.

The roadway intended for and used by travellers was a macadamised road of the width of 30 feet, and was not in any way out of repair, and was at the place where an accident occurred in all respects exactly as it was when transferred by the Government to the county.

The plaintiff, when turning out of a side road, in order to reach an hotel which stood near the side of Yonge street, drove along part of the original allowance for road on which the toll road was constructed, but which had never been opened for travel by the defendants, and was used merely as an approach to the hotel. In doing so, the night being dark, the plaintiff missed the way leading to the hotel, ran against some obstruction, and was, with his buggy, thrown down a cutting or embankment into the toll road and was injured.

*Held*, (reversing the judgment of the Court below) that there was no evidence of negligence, and that the defendants were not liable. The plaintiff had not been invited to use the travelled way to the hotel as part of the toll road, and the accident had not happened on any part of the toll road, or in consequence of that road being out of repair.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, setting aside the nonsuit ordered to be entered at the trial, and came to be heard before this Court on the 10th of February, 1888. \*

*J. K. Kerr, Q.C.*, and *J. A. Paterson* for the appellants.

*W. N. Miller, Q.C.*, for the respondent.

March 6, 1888. BURTON, J. A.—Had this been the ordinary action against a municipality having control over a highway, for an alleged breach of its statutory duty, and the accident had occurred upon that portion of the travelled road leading from the Whitechurch road to the Yonge street road, and lying within the limits of Yonge street, either by reason of any alleged want of repair on that

\* Present: HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

piece of road, or by reason of a dangerous hole or ditch on the main highway immediately contiguous to that piece of road, so as to render the travelling upon the road itself unsafe, there might possibly be a good deal of force in the contention that the defendants might be responsible for the injury ; but that is not this case, and upon the undisputed facts in this case, the liability of the defendants appears to me to be a pure question of law ; and I think that the conclusion arrived at by the learned judge at the trial in holding that no case of negligence had been established, was correct, and that the nonsuit was right.

The evidence of certain facts to which I am about to refer, was uncontradicted, and the learned judge upon that state of facts, has held, and I think properly held that the defendants were not bound as against the plaintiff either to remove the embankment, or to place, or erect railings or barriers of any kind upon it to prevent persons falling from it into the highway, which was their property, and which, no doubt, for the purpose of travel they were bound to keep in a proper state of repair.

The defendants acquired the Yonge street road from the Government by order in council, made the 4th April, 1865.

By various Acts of Parliament, the earliest of which was passed so far back as 1833, public grants were made and certain trustees were appointed for the purpose of expending them in improving certain roads leading to the city of Toronto, and among others the road in question, and to cause surveys to be made and contracts let for improving or macadamizing the same.

In 1840, certain commissioners were appointed who were empowered to take control over the several macadamized roads within their several districts, so far as the improvements had been authorised by any Act of the Legislature, and were empowered to shorten, vary, alter, or improve the same, making compensation for lands taken ; and the same Act refers to and repeals an Act which had been passed for completing the macadamization of Yonge street.

It is shewn in evidence that the trustees, in the execution of their powers, had, for some little distance near the place where the accident occurred, carried the macadamized road through a cutting, varying from two to three feet in depth, leaving the actual street as used by the public for many years before it's acquisition by the government about thirty feet wide.

The government acquired this road when the Public Works Act was passed in 1859, and in the state in which it then stood. They were empowered under that Act to abandon it, in which case the control and management of it would have passed to the several local municipalities in which it was situate, who would have been thereafter bound to keep it in repair under the same provisions of law which are thereby declared to extend to such a road or they were authorised to sell it, which was the course taken in this instance.

It would scarcely be contended, I should suppose, that the trustees or the commissioners who succeeded them, were bound to keep in repair anything outside of the limits of the road, which they originally constructed, whether that formed part of the original allowance for road or not.

Dealing, however, with the facts historically, it appears that when the Yonge street road was cut down, as I have mentioned, for the purpose of macadamization, the trustees made a cutting some distance to the north of the scene of the accident for the purpose of affording access to the road from the Whitchurch road, which has ever since remained pretty much in the same condition.

Some little distance to the south of where the accident occurred, is the Oak Ridge hotel, standing a short distance back from Yonge street, and a road has been in existence for many years, by whom made is not shewn, leading from Yonge street to the hotel, and communicating also with the Whitchurch road, leaving a triangular vacant space between these two branch roads and the bank forming the east limit of the toll-road.

The plaintiff was driving along the Whitchurch road

and intending to go to the hotel, but the night being dark he missed the road, and drove over this triangular vacant space and thence over the embankment in question, which was some fifteen feet from the road over which he intended to drive.

There is no question that the place where he left the travelled road, was within the limits of Yonge street, if that is sufficient to make the defendants responsible.

I have already pointed out that the road laid out by the trustees and acquired by the Government, and subsequently transferred by them to the defendants, was the macadamized toll-road made and constructed from the public funds, and was at this point thirty feet only in width, and bounded on the east by this embankment. There is no pretence, in my opinion, for contending that the trustees exercised any control over or were liable to keep in repair the portion of the original road allowance lying between their road at this point and the eastern limit of that road allowance ; the fact that the transfer was made to this municipal corporation, was a mere accident, it might have been made to a private company, and it would be difficult to see what responsibility would be cast upon them beyond making the road so acquired reasonably safe for persons having occasion to use it.

There is no evidence that the plaintiff was using the road as an approach to Yonge street, but on the contrary that he was driving to the hotel ; but assuming any responsibility in the defendants over this piece of road, the accident did not occur by reason of any defect in the road itself, nor by reason of there being any unsafe place immediately contiguous to the road itself ; but even if there had been any liability on that account it would not be cast upon these defendants. The evidence clearly shews that the embankment over which the plaintiff drove, was at least fifteen feet from the west side of the travelled road.

In an American case, the question is thus stated : " The true test is, not whether the dangerous place is outside the way, or whether some small strip of ground not included



in the way, must be traversed in reaching the danger, but whether there is such a risk of a traveller using ordinary care in passing along the street being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

Here the road was safe and convenient, and the land adjoining it was safe; a person straying from it, had to pass over a space of fifteen feet before coming to the embankment. If it would be fit, under such circumstances, to leave it to a jury to say whether that was in close proximity to the highway, it would be difficult to fix a limit to the liability of municipal corporations. I should say that it would not be proper under such a state of things to leave the question to the jury; but as I have said already, all such matters are foreign to this enquiry.

Pushed to its logical conclusion, any person straying from a farm lane or other place in the proximity of the embankment might maintain an action because the defendants left the road unfenced.

I venture to think that persons having the management of highways owe no such duty to the public; the injury in the present case was attributable to the darkness, and it can scarcely be gravely contended that the defendants were under any obligation to put up a railing along the top of the embankment. If so, they would be liable to an indictment for neglecting to place it there.

Doubts have, I am aware, from time to time been expressed in our Courts as to whether the defect or default must be of such a character as to render the defendants liable to an indictment, but the better opinion seems to be that the breach of a statutory duty which gives a plaintiff a private action for peculiar damages arising therefrom, sustained by him, must be such as to warrant a conviction upon indictment, and that seems to have been the view entertained by some of the Judges in the Supreme Court in a recent case, and to be well supported by authority: *Jervis, C. J., 1 Bing. N. C. 235*, in one case remarked:

"No case could be shewn of an action for a breach of

duty imposed by statute for which the party might not have been made responsible in another form;" and Williams J., says :

"Is there an instance of an action sustained for specific injury to a plaintiff from the breach by the defendant of a duty imposed on him by statute, where the party could not have been indicted for a misdemeanour?"

Being of opinion, therefore, that there was no obligation upon the defendants to place any railing on the top of the embankment, and that even if it had been shewn that the connecting road was under the control of the defendants, that it has not been shewn to be in such a dangerous position as to require fencing ; and that at the time of the accident the plaintiff was not using it for the purpose of travelling over it, but was intending to drive to the hotel, and by reason of the darkness, reached the embankment and drove over it, there being no obligation on the part of the defendants to fence at that place, the nonsuit was right and ought not to be interfered with.

PATTERSON, J. A.—This action has been tried twice. At the first trial the plaintiff was nonsuited and a new trial was ordered on the ground that the question whether or not the place where the plaintiff's vehicle was upset was a highway, ought to have been left to the jury. At the second trial the evidence was not quite the same as at the first. At least I do not see in the reported evidence of Mr, Curtis any statement similar to one referred to in the judgment granting the new trial as important upon the question of highway or no highway. A second nonsuit was entered, the learned Chief Justice of the Common Pleas, the late Sir M. C. Cameron, holding that the rule of the Municipal Institutions Act upon which these actions usually turn, was not applicable to Yonge street, and acting, at the instance of the defendants, upon the view he held, by entering a nonsuit in place of leaving any questions to the jury, the purpose being intimated to bring the matter before this court, before going again to trial, if a new trial should be ordered.

No evidence of the original laying out of Yonge street was given; and whatever we may suppose we know by way of popular local information or from other sources, such as Dr. Scadding's entertaining reminiscences of "Toronto of Old," we have no judicial knowledge on the subject.

The road appears in the Schedule A to C. S. C. ch. 28, among the public works to which that statute relates, as "The Main North Road, from Toronto to Lake Huron at Penetanguishene;" or it formed part of that main road. The order in council of the 4th of April, 1865, is in evidence by which, under section 77 of the Act, the sale of several roads to the corporation of the United Counties of York and Peel, was carried out, this road being described as—

"The macadamized toll road running northerly from the liberties of the City of Toronto, in the County of York, to the village of St. Albans, being composed of that part of the public toll road, known as Yonge street, or the north Toronto road to Holland Landing, lying between the northern limit of the liberties of the City of Toronto, and a line drawn across the said road at right angles to the eastern limit thereof, at the distance (measured in the centre line of the road) of six hundred and eighty feet north from the face of the north abutment of the bridge on the said road over the branch of the Holland river, nearest to the said village of St. Albans."

In the same year, 1865, the roads were vested in the county of York, "free from all claim of the county of Peel, as fully and effectually as if the said York roads had been purchased from Her Majesty by the County of York alone:" 29 Vict. ch. 69.

One of the conditions of the sale, following the 81st section of the Act, was that the road should be kept in thorough repair by the county.

It is also stipulated that the roads and bridges transferred, shall at all times continue to be public highways, subject only to the payment of the tolls legally imposed thereon.

The liability of the defendants to an action at the suit

of any person lawfully using the road who sustains damages from neglect of the corporation to keep the road in repair, is not questioned, and could not now be disputed without impugning the authority of decisions of long standing, such as *Macdonald v. Hamilton and Port Dover Road Co.*, 3 C. P. 402; *Regina v. Paris*, 12 C. P. 445; *Regina v. Brown*, 13 C.P. 356; *Regina v. Mills*, 17 C.P. 354.

It is clear, as held by the learned Chief Justice at the trial, that the liability of the defendants must be determined with reference to their ownership of the road under the order in council and the statute C. S. C. ch. 28, and not under any provision of the Municipal Institutions Act. There is no provision in that Act which would impose any liability on the county, even if it were shewn that the road was an original allowance laid out by the Crown surveyors, in the absence of a by-law of the county council assuming the road. Section 536 of the Act of 1883, enacts that all township boundary lines not assumed by the county council, shall be opened, maintained, and improved by the township councils, except when necessary to erect or maintain bridges over rivers forming or crossing the boundary lines between two municipalities. Yonge street is a township boundary line, as we may assume from the geographical position of the townships of Whitchurch and King, which front on the opposite sides of it; but of course was not under the jurisdiction of the townships any more than of the county.

There does not appear to be any material difference in the accounts given by the various witnesses of the locality or the incidents of the accident.

The road is described as being in all respects exactly as it was when transferred by the Government to the county.

The roadway intended for and used by travellers going up or down Yonge street, is macadamized to the width of about thirty feet, and is not said to have been in any way out of repair.

The greater part of the discussion and of the evidence relates to the approach to Yonge street from the Whit-



church side road, a little north of the Oak Ridges hotel. The side road runs from the east side of Yonge street, on a course so much south of east as to enter Yonge street at an angle so acute as, according to some witnesses, to make it difficult for a waggon with a long reach, as *e. g.*, when carrying a load of hay, to turn to the south on Yonge street. It is said to be and always to have been usual for people intending to go south, or coming from the south, to avoid this awkward angle, and to save a little distance, by driving over a beaten track which leaves the macadamized part of Yonge street some 80 or 90 feet south of the side road, and, making an obtuse angle with Yonge street, joins the side road something over 50 feet to the east, thus enclosing a sort of delta with the three lines, viz., the side road proper, the east line of the macadam on Yonge street and that beaten track. I estimate these distances from the rough plan furnished to us.

This beaten track has not varied, according to the plaintiff's witnesses, from the earliest dates of which they can speak, certainly over 28 years, either in its position or its condition. It is simply a track beaten by the travel upon it, but not otherwise a made road. It is not in a straight line, but makes two curves, leaving the side road in a westerly or south-westerly direction, and reaching the metalled roadway on Yonge street, in almost the same direction, but having the middle part of its course parallel or nearly so with Yonge street; in other words, almost due south. The reason of this change of course I shall mention.

On the Yonge street side of the delta, the 30 feet roadway has been cut through a knoll, making a bank on the east side of three and-a-half feet perpendicular height, the top of the bank being on the same level as the north and south stretch of the curved track, and something under 15 feet from the track.

Now, the track in place of being curved, might have run in a straight line from where it leaves the side road to where it strikes the roadway on Yonge street, were it not

that a stable or barn is in its way. Its first course is, therefore, to the north-west corner of the barn which it nearly touches; and then it has to turn south along the front of the barn to avoid the bank, or perhaps originally to get round the knoll, and having gone far enough for that purpose, it resumes the south-westerly course and so reaches the metalled roadway.

There is evidence, not very precise but evidence for the jury, that the full width of Yonge street is 66 feet. There is no fence along the line of the street at the spot in question; but the line appears to be from twelve to fifteen feet from the top of the bank, and there is a further distance of about ten feet from the line to the front of the stable. The curved track, which is marked on the plan "travelled roadway," after coming from the side road, as I have explained, in a westerly or south-westerly direction, first touches the limit of Yonge street, opposite the corner of the barn; then turning south, it runs along the line of the street, being partly on the Yonge street side and partly on the Whitchurch side of the line, for some 20 or 30 feet, before turning again towards the west or south west.

I cannot get hold of the distances very precisely. A surveyor, who was called for the plaintiff, gave some measurements of his own, and was asked by the defendant's counsel about others, of which he gave a proximate opinion. One result of his evidence is, that the centre of this travelled track where it runs along the Yonge street line, must be upwards of fifteen feet from the top of the bank.

The plaintiff, driving from the side road on a very dark night, did not turn sharply enough to the south when he reached the corner of the stable, and the consequence was that he was upset down the bank. That is his cause of action.

The Oak Ridges hotel is a way-side inn on the east side of Yonge street, in the township of Whitchurch. It stands, with its outbuildings, back from the east limit of Yonge street from ten to twenty feet, as nearly as I

can judge from the plan, the space or frontage occupied, from the north corner of the stable already mentioned, to the south corner of the inn, being from 150 to 200 feet.

All this space, that is, from the side road to the south of the hotel, is open to Yonge street, and people, as they go to and from the hotel, drive on any part of the ground east of the macadamized roadway, the part which is Yonge street not being distinguishable from the part which is the private property of the hotel-keeper. In fact, we notice on the plan that the pump in front of the inn, is on the very line of the street.

On the night in question, the plaintiff who had driven a party in an omnibus from Aurora to a place in Whitchurch, was returning with them. His direct route would have been down the side road to Yonge street, and then north along Yonge street to Aurora; but, intending to water his horses at the hotel pump, he left the side road by this travelled track, and unfortunately missed the proper turn in the darkness.

There can be no suggestion that the plaintiff was invited to use the travelled track as a part of the toll-road, so as to create a liability of the nature of a contract on the part of the county, such as was affirmed in *Francis v. Cockrell*, L. R. 5 Q. B. 84, which was referred to in the court below.

The toll-road was in good order. The irregularity was on the part of those who, for their own convenience, chose to drive on to or away from the macadamized road way by the track round the stable instead of following the side road.

Nothing turns on the fact that the defendants happen to be a municipal corporation. The Statute C. S. C. ch. 28, sec. 76, authorises arrangements with any of the municipal councils or other local corporations or authorities, or with any company incorporated for the purpose of constructing or holding such works or works of a like nature, for the transfer to them of the public roads, &c, whether within or without the limits of the local jurisdiction of such municipal councils or other authorities, which it is found con-

venient to place under the management of such local authorities or companies.

The transfer might have been made to some other municipal corporation, or to a road company ; and the transfer to the county cannot properly be held to charge the county with any duty which would not equally have attached to any other corporation or road company who took over the road.

What was transferred was the existing toll-road, one of the public works already constructed and in operation. The undertaking of the transferee was to keep that road in thorough repair, not to undertake any further work of construction.

Some evidence was given apparently with the object of bringing this track within the definition of highways in the Municipal Act, by shewing that statute labour had been done upon it in the township of Whitchurch. Roads upon which the "statute labour had been usually performed," are public highways. There is no evidence whatever of such *usual performance of the statute labour*, or of any recognition of this track as a highway by the township authorities.

The evidence merely is that of Mr. Curtis, the hotel-keeper, who used sometimes to be path-master, and used sometimes to level the track where it passed round his barn or stable.

If this is a highway the township may be indicted if they let it be out of repair, but no one could contend that, on the evidence here given, the township could be charged with the care of this track as one of its highways.

The point attempted is that the plaintiff reached Yonge street from a public highway, and that the duty of the county was to have Yonge street at that spot in a safe condition for driving on in the dark. But the evidence of the track being a Whitchurch highway entirely fails, and the position resembles that put by Mr. Kerr, of a person happening to drive into a ditch while attempting to make his way directly from a field adjoining the road to the



metalled road way, in place of going by the cross-road provided for the purpose.

There may have been some idea of making out this long-trodden track to be a highway, not only in Whitchurch, but where it occupies part of Yonge street. This idea suggests two observations, apart from the inadequacy of the proof of the track being by itself a highway. If a highway, it is not out of repair; and as a highway simply, the duty to repair it would not be on the county.

Nor can anything turn on the fact that the public have been accustomed for a long time, though without legal right, to use this track as an access to the metalled street, because if any duty could be said to arise from the acquiescence in the user, a point which is at least very doubtful, the plaintiff has not been prevented from using it. There would have been no trouble if he had kept to the track.

The only question, after all, is, whether the purchaser from the Crown of a public toll-road actually constructed and in use, and sufficient for the purposes of travel as far as the breadth of metalled roadway and the junctions with other highways are concerned, is bound to provide for the ease and safety of persons who choose to travel on the other parts of the road, by undertaking to level, grade, metal, or fence such other parts.

The corporation is, by the order in council, to "keep the said roads and bridges thereon, or which may hereafter be erected or built thereon, and all other the works and premises hereby transferred, at all times hereafter in thorough repair;" the sufficiency of the repair, for the purpose of that conveyance or order is to be decided by an engineer appointed by the Commissioner of Public Works; and there is a forfeiture clause in case the engineer should at any time report, or a grand jury present, that the roads or any of them, or the bridges thereon or any part thereof, are not in sufficient and proper repair for the purposes of travel. The "*premises*" referred to, I take to be the toll-gates, toll-bars, and toll-houses specified along with roads and bridges in the operative part of the conveyance.

Now the measure of the duty of the defendants to the public as well as to the Crown seems to be here expressed, and except so far as the necessity for sometimes building a new bridge is contemplated, which is another form of repairing that portion of the works, nothing new in the way of construction is required.

I think we should allow the appeal with costs.

HAGARTY, C.J.O., and OSLER, J.A., concurred in the result; agreeing with the opinion of the trial Judge, Chief Justice the late Sir Matthew Cameron.

*Appeal allowed with costs.*

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### BOWERMAN V. PHILLIPS.

*Creditors' Relief Act, R. S. O. ch. 65, sec. 10—Third party attacking judgment of another.*

One creditor cannot attack the judgment of another and object to his sharing pursuant to the Creditors' Relief Act in the distribution of moneys levied by the sheriff under executions in his hands, on the ground that the note on which such judgment was recovered was mis-described, and the date of its maturity was mis-stated in the writ of summons, in order to obtain judgment earlier than could otherwise have been done; the debtor not consenting or objecting to the recovery.

Where the debt is *bond fide* another creditor cannot object to the judgment merely because there was a defence which the debtor might have set up to the particular action.

*Glass v. Cameron*, 9 O. R. 712; *Macdonald v. Boice*, 12 Gr. 48, distinguished.

Whatever power the Creditors' Relief Act may give to a creditor to contest the claim of another, it does not extend to the impeaching of a judgment by a summary proceeding before the County Judge.

Order complained of reversed.

THIS was an appeal by the plaintiff from the judgment of the County Court, of the County of Prince Edward, and came to be heard before this Court on the 30th day of May, 1888.\*

*Aylesworth*, for the appellant.

*G. H. Watson*, for the respondent,

\* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

The facts appear in the present judgments.

June 29, 1888. PATTERSON, J. A.—Bowerman and Talcott are creditors of Phillips, and this appeal arises out of a dispute between them concerning money levied by the sheriff out of the goods of Phillips. The sheriff had nine executions against Phillips in his hands, Bowerman's being number six and Talcott's number seven. The money made by the sheriff was not over fifteen per cent of the aggregate amount of the nine executions. Bowerman's execution being for \$372, his share under the Creditors' Relief Act, and as set out by the sheriff in his scheme of distribution, was \$53.24, which amount, if disallowed to him and thrown in among the other creditors, will yield less than two and a-half per cent. upon their claims, adding about \$8 to Mr. Talcott's dividend. For that amount of \$8 he attacks Bowerman's judgment in the court below, and \$53.24 is the extent of Bowerman's immediate interest for which this appeal is brought. It is evident that on neither side is the game worth the candle.

Bowerman sold horses to Phillips in 1886 for \$325. He affirms that he sold them in May, 1886, but the promissory note which he took for the money was dated the 16th July, 1886. No explanation is given of the difference of date. The note was at eighteen months after date, thus falling due after the middle of January, 1888.

On the 21st December, 1887, an action was commenced by writ of summons by Bowerman against Phillips; an appearance was entered by a solicitor; on the 24th December a statement of claim was delivered; and on the 4th January, 1888, judgment was entered for want of defence.

In the indorsement on the writ of summons, and also in the statement of claim, the action was stated as being for \$325, and interest, upon a promissory note dated the 16th May, 1886, and due eighteen months after date.

It is assumed throughout the materials before us, and no one disputes that the \$325 was really the price of the horses.

Mr. Bowerman speaks of Phillips having in November, 1887, promised to pay him the whole amount in a few days notwithstanding that the note was not due.

If the action had been ostensibly for the price of the horses, or even for the amount of the promissory note properly described, there could be no pretence of right in a stranger to the judgment to attack it merely because the defendant did not choose to avail himself of a valid defence.

The question is whether Talcott, or any other creditor whose execution comes into competition with that of Bowerman, can under the circumstances attack this judgment in the way in which it is now attacked.

What Talcott did was to file an affidavit under R. S. O. 1887, sec. 10, sub-sec. 4 (formerly 47 Vict. ch. 10, sec. 7, sub-sec. 16) as a creditor is allowed to do when he contests the claim of another creditor who has not judgment, but who is proceeding under the Act to obtain a certificate which will be equivalent to an execution.

The provisions on the subject trench a good deal on the principle which ordinarily prevents a stranger from interfering in a contest, either before or after judgment, between debtor and creditor. They do not however apply to a case of judgment recovered. Furthermore, if the plaintiff Bowerman had not recovered judgment but had come in under the statute, the contest, which was instituted on the 2nd February, would have been unavailing, because the note was then overdue, and the result would have been to let Bowerman in for the same ratable share as has been allotted to him by the sheriff.

The judgment appealed from is not a judgment on Talcott's proceeding. It is upon an application by Bowerman on which Talcott was called on to shew cause why the sheriff should not be ordered to pay over the \$53.24 to Bowerman, or why an order should not be made declaring Bowerman's judgment to be *bonâ fide*, and to have been recovered for a debt really and in good faith due from Phillips to him, and that Bowerman was really entitled to the said dividend upon his judgment; and why the pro-



ceedings taken by Talcott should not be declared null and void.

The learned judge, after hearing argument, and both sides having filed affidavits, ordered that the plaintiff's application should be dismissed, and further that the plaintiff's judgment and the execution issued thereon should be set aside, giving the costs of the application to Talcott. That is the order appealed against.

An objection was taken to the right to appeal, under sec. 38 of the R. S. O. which gives an appeal from a final order upon any contestation matter or thing, but limits it to cases where the amount involved in the question exceeds \$100.

This is not, as I have already shewn, an order made upon such a contestation as the Act authorizes. It is the setting aside of the judgment that is complained of; and though the money which the sheriff has so far been able to levy gives a dividend of less than \$100 to the plaintiff, non constat that further moneys may not be made.

The order asked for against the sheriff cannot properly be said to be a proceeding under the Act. If the money is applicable to the plaintiff's execution, the plaintiff's right to it and his remedy against the sheriff stand on the same footing as if his was the only execution, or as if there was enough to pay every one.

Whatever power the statute gives to a creditor to contest a claim advanced by another, it does not extend the power to the impeaching of a judgment by a summary proceeding. A charge of fraud must be prosecuted in a different way. The only indirect conduct here charged is the misdescribing the promissory note, and though that might not unfairly be stigmatised as asserting a claim which at the time was to some extent a fictitious one, yet it was for the purpose only of accelerating the remedy for a real debt, and in order to accomplish what by an understanding with Phillips could have been done without either in appearance or in reality violating any law or infringing the rights of other creditors.

It is, as I understand, chiefly as an abuse of the process of the court that the learned Judge holds the judgment invalid.

The unnecessary misdescription of the note in the writ and in the pleading certainly exposes the plaintiff to that charge; but even on that ground the judgment could not be set aside in the absence of the party against whom it is entered.

While holding that for these reasons the judgment appealed from must be reversed, we must not forget, particularly when adjudicating as to costs, that it was the plaintiff who invoked the interference of the learned Judge in respect of the judgment, and asked him in the absence of Phillips to declare it *bonâ fide*, and for a debt really due.

The Judge could not properly have done so. He could only leave it as he found it, subject to be attacked either in a summary way by the proper party, or brought in question in an action if it was charged to offend against any law.

We therefore simply allow the appeal, and direct that the application of the plaintiff in the court below be discharged without costs, leaving him to his ordinary remedy against the sheriff for the money. The proceedings initiated by Talcott under the assumed authority of the Act, being unauthorized and outside of any provision of the Act, will not stand in his way.

We give no costs of the appeal.

OSLER, J. A.—The learned Judge gave effect to Talcott's contestation by holding that the plaintiff's judgment was not a *bonâ fide* judgment, and had been improperly obtained, and he therefore set it aside. There is no reason to suppose that he would have held that the plaintiff was not entitled to be ranked in the sheriff's distribution scheme for any other reason. If the judgment stands there is nothing, as far as appears, to impeach that right.

That Phillips was really indebted to the plaintiff on the promissory note sued on is not disputed, and it seems

equally clear that the note was not actually due at the time the action was brought, nor until nearly a month afterwards. The plaintiff however chose to bring his action taking the chance of Smith's defending it, apparently having a pretty well grounded assurance, from what had previously passed between them, that he would not do so.

In such circumstances it appears to me that if the judgment debtor does not complain no one else is in a position to do so. The judgment and execution have been obtained for a real debt and certain legal consequences follow as to sharing in the equal distribution of the money in the sheriff's hands. A creditor (it cannot now be said a rival creditor) can no more complain of such a proceeding than of a judgment obtained upon a demand note substituted by the debtor for the original security to enable the holder to obtain a speedy judgment, or even of one obtained upon an order for judgment made by consent of the debtor. No unjust preference or priority is obtained by any creditor, and the policy of the law which encourages the equal distribution of the debtor's estate among his creditors is thereby promoted.

Under the Absconding Debtors' Act as it formerly stood, R. S. O. ch. 68, sec. 21, a judgment collusively obtained even for a real debt for the purpose of defeating the equal distribution of the estate of the absconding debtor might be set aside or proceedings thereon stayed at the instance of the attaching creditor (*Bevan v. Wheat*, 14 C. P. 51; *Dickson v. McMahon*, 14 C. P. 521; *White v. Lord*, 13 C. P. 289.) If there was no reason to doubt the bona fides of the debt, the judgment was left as the foundation of a writ of attachment under which the creditor came in on equal terms with the others. I refer to this provision merely to shew that special legislation was necessary to enable one creditor to attack the judgment of another upon any such ground as is here relied upon. It is now repealed, as an execution creditor no longer gains any preference over the attaching creditor by priority in point of time (46 Vict. ch. 6; 49 Vic. ch. 16, sec. 36; R. S. O. 1887, ch. 65, sec. 22; ch. 66, sec. 20.)

The present case is within the rule laid down in such cases as *Turner v. Lucas*, 1 O. R. 623, and *Macdonald v. Crombie*, 11 S. C. R. 107. The case of *Glass v. Cameron*, 9 O. R. 712, cited by Mr. Watson has no application; there the plaintiff had a judgment and execution against the defendant as executrix, and M. had a judgment and execution against her in her personal capacity. The plaintiff by untruly representing to the Court that M.'s execution had expired obtained an order to amend his own judgment and execution nunc pro tunc into a judgment and execution against the defendant personally, thus obtaining in appearance at least, priority over M., whose execution had in fact been duly renewed. It was held that M. was entitled to intervene to set aside the order and amendment which had only been obtained in consequence of the plaintiff's direct misrepresentation of M.'s own position. The difference between that case and the present is obvious. Nor is there the least analogy between this case and those of which *McDonald v. Boice*, 12 Gr. 48, is an example, in which it is held that one creditor may attack the judgment of another as being fraudulent, as for instance where it is recovered for a fictitious debt. Where the debt is bonâ fide another creditor cannot object to the judgment merely because there was a defence which the debtor might have set up to the particular action in which the recovery is had. The case of *Molson's Bank v. McMeekin*, (a) decided at our present sittings may be referred to.

Mr. Watson objected that no appeal lay from the order setting aside the judgment. It is an order made in the cause, and by the Judge of the Court in which the judgment was recovered, and is a final order. I cannot see that it makes any difference that it is also made in a proceeding taken under the Creditors' Relief Act. Nor is the plaintiff estopped from objecting to the order. It goes far beyond any order which the learned Judge was invited to make upon the motion before him.

I think we should allow the appeal. The course taken

(a) Ante p. 535.



by the appellant, first, in mis-stating the date of the note which if done for the purpose of misleading the officer of the Court on entering judgment was extremely discreditable, and secondly, in making a wholly unnecessary application to the Judge below, out of the order upon which the appeal arises is a sufficient reason for not giving costs.

HAGARTY, C.J.O., and BURTON, J. A., concurred.

*Appeal allowed without costs.*

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## HISLOP V. THE TOWNSHIP OF MCGILLIVRAY.

*Municipal Act (1883) secs. 524, 531, R. S. O. 1887, ch. 184 sers. 524, 531—Original road allowance—Discretion of council to open—Mandamus.*

Municipal councils cannot be compelled by mandamus to open for travel an original road allowance.

Whether they will do so, is a matter which rests entirely in the discretion of the council.

Judgment of the Q. B. D. 12 O. R. 749, affirmed on this ground.

Secs. 524, 531, of the Municipal Act considered.

The general duty to repair imposed by the latter exists only in regard to travelled roads, and not to roads which have never been opened. Such duty can only be enforced by indictment.

*Moulton v. Haldimand*, 12 A. R. 503, on this point referred to and followed.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 12 O. R. 749, and came on to be heard before this Court, on the 9th April, 1888.\*

*McCarthy*, Q. C., and *R. M. Meredith*, for the appellant.  
*Meredith*, Q. C., for the respondents.

The facts are fully stated in the report of the case in the Court below.

May 8, 1888. PATTERSON, J. A.—The plaintiff in his statement of claim sets out that he is a farmer and has for many years owned and lived on lot number eight in the sixth concession of the township of McGillivray, which abuts on the allowance for road between the sixth and seventh concessions, and that he has no means of ingress to or egress from his lot by any other road or highway abutting the lot.

The lot is described as containing one hundred acres, and is, I understand, properly a half lot, running to the centre of the concession, and having therefore no allowance for road at the rear and not having any such allowance between it and the adjoining lot on either side.

\*Present—HAGARTY, C. J. O.. BURTON, PATTERSON, and OSLER, JJ.A.

The rights which the plaintiff claims in this action are asserted on several grounds as formulated in paragraphs 3, 4, 5, 6, and 7 of his statement. Paragraphs 3 and 4 charge the defendants with stopping up the road allowance, and paragraphs 6 and 7 allege promises respecting it. All that needs to be said of these four paragraphs is that they are not supported by evidence, and that no question respecting them was left to the jury.

The claim relied upon is to be found in paragraph 5, which is in the words :

“5. It was and is the duty of the defendants to maintain and repair the said road and to keep the same in repair, yet the defendants have not maintained and repaired and kept in repair the said road.”

This count might properly be disposed of on the demurrer, which is included in the defence as pleaded, on the ground that there is no such duty at common law upon the defendants as is alleged in this paragraph and that it asserts a wider duty than that imposed in terms by the statute which merely declares that “every public road, street bridge and highway shall be kept in repair by the corporation.”

We may, however, disregard the pleadings, because it seems to have been agreed at the trial that certain questions should be answered by the jury. It was not agreed that the jury's findings of fact should be unquestioned; but the agreement as to the questions to be asked serves to limit the range of the discussion.

The jury found that the portion of road in question was part of the original allowance; that the defendants had the financial ability to make it reasonably fit for travel; that it is practicable to make it reasonably safe and fit for travel without encroaching on the lands adjoining it; that it would have been a reasonable expenditure of money to make it fit for travel; that the defendants had reasonable time and opportunity do the works necessary to make it fit for travel or to provide some other means of ingress and egress to his lot, No. 8; that if the

plaintiff had not convenient means of ingress and egress to his lot, No. 8, the want of it was due to the default of the defendants; that under all the circumstances in evidence the defendants should have made the portion of the allowance for road fit for travel; and that the defendants in determining not to make the road in question, so determined in good faith.

Other material facts on which the argument has proceeded were not matters of dispute, and it was doubtless thought unnecessary to formulate them in the shape of findings by the jury.

The plaintiff bought lot 8 from the Canada Company about the year 1849 and went to live upon it. The allowance for road across the front, or north end of the lot, was and is still impassable by reason of natural obstructions from steep hills and by reason of two tracts of marshy land where a river twice crosses the line.

In order to provide a practicable road for travel in lieu of this portion of the original allowance the township council about twenty-five years ago opened a road, which is spoken of as the forced road, and which, leaving the concession line on lot seven, which adjoins lot eight on the west, runs northerly and easterly through part of the seventh concession and rejoins the concession line at lot ten, thus forming a loop which nowhere borders on the plaintiff's lot eight.

Efforts were made on more than one occasion, on the part of the council to accommodate the plaintiff by providing convenient access from his residence to this forced road or to some other highway.

The object was not attained.

In the Divisional Court the late Chief Justice, Sir Adam Wilson, whose opinion was not against the abstract right to maintain the action, considered that the plaintiff's own conduct in connection with those projects disentitled him to relief by mandamus which he asked for.

Mr. Justice O'Connor, who had tried the action, thought



the plaintiff entitled to recover; and the present Chief Justice held that the action should be dismissed.

It unfortunately happens that the judgment written by him has been lost and we have only a summary by the reporter to the effect that Mr. Justice Armour was understood to hold that sec. 531 of the Municipal Act of 1883 applied only to highways which were highways in fact as well as in law; that the allowance for road in question was only a highway in law and not in fact; and that the opening of it was entirely in the discretion of the council, whose discretion could not be interfered with by the court and that under any circumstances indictment was the only remedy.

These conclusions coincide so closely with my own opinion that I should probably have simply adopted the judgment by which they were supported if it had been accessible.

The plaintiff asserts against the council the right to have the concession road along the front of lot eight made into a road fit for travel. He owns the adjoining half of lot seven, and has in that way access from his farm to the forced road, but he insists on the right to have a practicable road at the front of lot eight, and if I do not misunderstand his claim, to have the allowance across the whole front of that lot made practicable as a road. The evidence shews that though this is not impossible as an engineering enterprise the expense would be very great, and that the road is required only for the convenience of the plaintiff and his brother, who lives on lot nine, and not for the general public.

The claim depends entirely on what is, in my opinion, a misapprehension of the scheme of our municipal law respecting roads, and upon failing to keep in mind the distinction between highways which owe that designation only to section 524 of the Act of 1883, and the highways in relation to which the decisions in English cases have been pronounced.

Section 524 includes, amongst ways that are to be deemed common and public highways, all allowances made

for roads by the crown surveyors in any town, township or place already laid out or hereafter laid out.

The system of survey in laying out any town, township or place is and always has been, as a rule, to lay out concessions and lots of uniform size and rectangular shape, the allowances for roads being made at regular intervals between concessions and lots without any regard to the adaptation of the ground for the purposes of a highway. The inevitable result is that many such allowances can never become travelled roads, either by reason of absolute unfitness or by reason of the outlay required to make roads of them; and this has always been recognized by the Municipal Institutions Acts; 9 Vict., ch. 8, and 22 Vict., ch. 99, sec. 319, which corresponds with sec. 552 of the Act of 1883; —and see secs. 550 (1) (9), 551 and 565.

Still they remain statutory highways, and the rights of the public to such uses as they are capable of remain, unless they are stopped up under section 550, or in possession of a private person and enclosed with a lawful fence under the circumstances mentioned in section 552.

The position of the piece of the concession line in front of lot 8, in the view of the statute, may be deduced from this section 552, though the section does not directly apply to it. The section deals with a part of a government allowance for road, "which has not been opened for public use by reason of another road being used in lieu thereof." That exactly describes the place in question. If the owner of the adjoining lot has it enclosed by a lawful fence he is to be deemed legally possessed thereof, as against any private person until a by-law has been passed by the council for opening it. If he has not enclosed it, which is the present case, the section does not affect it; but, all the same, it is a part of a government allowance for road which has not been opened for public use.

When section 531 enacts that every public road, street bridge, and highway shall be kept in repair by the corporation and attaches to the default in the performance of that duty the liability to indictment and the responsibility

for all damages sustained by any person by reason of such default, it is obvious that the public highway intended is not a road allowance across precipitous hills or through a lake or morass where no sane man would think of spending money or labor in the attempt to make a road—road allowances of that description may easily be found, and they are under section 524 common and public highways. Nor is there any necessity for carrying the idea of this statutory highway into section 531. We have there, it is true, the term, “public highway,” but when we read in connection all the associated words, “public road, street, bridge and highway,” as well as have regard to the purpose of the enactment, it is plain that travelled roads, &c., including allowances for roads on which the corporation has, by opening them, invited the public to travel, are intended, and not a road which has never been opened, but in lieu of which another has been provided and is used by the travelling public.

The duty to repair, where it exists, and where it is only the general duty created by section 531, can only be enforced by indictment, as was held by Chief Justice Armour. We pointed out the same thing in this Court in *Moulton v. Haldimand*, 12 A.R. 503, where some of us considered that specific duties such as those imposed by section 535 on county councils might be enforced by mandamus, but all agreed that indictment was the only mode of enforcing performance of the general duty to repair.

On these two grounds the plaintiff's action, even if prosecuted on behalf of the public, would fail, and it, of course equally fails, so far as he asserts rights simply as one of the public.

The same difficulty, from the duty created by section 531 attaching only with respect to travelled roads or road allowances opened for travel, stands in the way of the assertion of rights in the character of owner of lot 8, and there are other insuperable difficulties.

It is a fallacy to regard our municipal corporations as boards of commissioners charged with the care and main-

tenance of the highways of their districts. Some of their functions under section 531 may resemble those of such bodies, though even then they necessarily have a wide discretion as to the mode of performing the duty to keep in repair the roads with which the section deals.

It must not be forgotten that they are the representatives of the ratepayers exercising on their behalf the discretion vested in them, which discretion extends to (amongst other things) the opening and stopping up of government allowances for road, subject as to the stopping up, to certain express restrictions.

I am not prepared to say that the court could properly interfere so far as to require a municipal council to entertain the question of opening such a road and to exercise its discretion upon it; but if jurisdiction to that extent could properly be assumed, it could, as I apprehend, go no farther.

We have here the fact found that the council, having considered the question, decided in good faith not to open this allowance.

My opinion, therefore, is that we should dismiss the appeal with costs.

OSLER, J. A.—It is shewn that in the year 1862 the defendants, being satisfied that it was impracticable, or nearly so, and at all events extremely inconvenient and expensive, to open that part of the original road allowance which the plaintiff now seeks to compel them to open, acquired land for the purpose of laying out and constructing another road in lieu thereof some 300 feet or so to the north. This road they have ever since maintained and kept in repair and the plaintiff has always had access thereto from his farm. It does not appear that the original road allowance has ever been sold or taken possession of by the person or persons who gave the land for the new road, and the council have in the bonâ fide exercise of their discretion always refused to open and construct for travel a road upon the part of the original road allowance in question.



It is in my opinion a matter which rests in the discretion of the council as representing the whole municipality to determine whether they will open for travel a road over any particular road allowance within their jurisdiction. When they have so opened it, and until they by by-law legally close it, they are no doubt bound by law to keep it in a state of repair suitable to the condition of the community and adequate to their wants.

But I am aware of nothing in the Act which gives, as it were, an appeal from the discretion of the council to a jury, or to the court, or imposes upon them any such specific duty, or entrusts them with such a power to be exercised in favor of persons specifically pointed out, as a Court can direct the performance of. The council must be best qualified to judge, and I think it was intended that they should be the judges, having regard to their intimate knowledge of the affairs and wants of the municipality, whether from a judicial point of view, or the necessities of the case, or otherwise, it is desirable to open any particular road allowance, or whether the needs of the community may not be better served by opening a road in lieu thereof.

2. If the discretion of the council was open to review, my opinion would be that in the circumstances of this case it had been properly exercised.

On both grounds, the action, which is entirely novel and a mere experiment, fails, and the appeal must be dismissed.

HAGARTY, C. J. O. and BURTON, J. A. concurred.

*Appeal dismissed with costs.*

[This case has been since carried to the Supreme Court].

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## WELLS V. LINDOP.

*Defamation—Slander—Qualified privilege—Express malice—Third trial—Judge's charge—Misdirection not occasioning substantial miscarriage—Consolidated Rule 791.*

In an action for slander where the defence was that if the defendant had spoken the words (which he denied), the occasion was a privileged one, there had been two trials, each resulting in a verdict for the plaintiff. The defendant moved for a new trial for misdirection by the learned judge in (among other respects) not fully explaining to the jury that unless the plaintiff proved that the words were spoken with actual malice, he was not entitled to recover :

*Held*, [affirming the judgment of the Ch. D. 14 O. R. 275] that taking the charge as a whole, and without laying undue stress upon isolated expressions, the jury had substantially been told that the occasion was privileged ; and that unless they were satisfied that defendant had abused the privilege and availed himself of it to make the statement maliciously, they should find for the defendant.

In considering an objection for misdirection, the question is not whether every expression in a charge is perfectly accurate, but whether there is any reason to believe that a verdict, which is warranted by the evidence, has been caused or induced by an erroneous enunciation of the law by the court.

Per PATTERSON, J. A.—The case was one for the application of Rule 311 (Consol. Rule 791) as, if there was any misdirection, it did not appear that substantial wrong or miscarriage had been caused by it.

THIS was an appeal by the defendant from the judgment of the Chancery Divisional Court, reported in 14 O. R. 275, where, and in a previous report (13 O. R. 434), the facts are fully set forth, and came on for hearing before this Court on the 11th and 14th of May, 1888.\*

*Aylesworth* and *N. McDonald*, for the appellant.

*Osler*, Q. C., and *Donahue*, for the respondent.

June 29, 1888. HAGARTY, C. J.—A careful examination of the evidence convinces me that the verdict for the plaintiff was fully warranted by it. The sole reason pressed upon us on the appeal rests on close criticism of the judge's charge, or rather on certain sentences picked out of it and separated from the context.

It must be borne in mind that no evidence was rejected ; that the fullest latitude was allowed to both litigants in

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, J.J.A.

the production and examination of witnesses; that the whole controversy, charge, and counter-charge, was investigated at the trial, and I am bound to say that the verdict for plaintiff cannot be interfered with on any thing appearing in the evidence.

The jury believed, as they had the right to do, that the defendant spoke the words charged as slanderous. He referred the witness to Foster, the person to whom the letter was written, from which he stated he derived his information on which he spoke. The witness accordingly went to Foster, and the letter was produced, and the contents discussed and told to the jury, so that the alleged foundation of the slander and defendant's reason, as he alleged, for uttering it, in short, the whole substance of his justification and the ground-work of his asserted privilege was most fully and thoroughly examined.

The jury were told that if they were satisfied that the defendant made use of the words without malice, "that is to say, that he did it as a reasonable man giving a reasonable answer to a wife when she applied to him for the payment of the husband's wages. \* \* \* If you think that was the case, then, in my opinion, the occasion would be privileged, and your verdict should be for defendant."

Again he said that if it was said in good faith the occasion would be privileged, and defendant entitled to the verdict. I need not repeat the rest of the long extract from the charge given in the judgment in the Chancery Division.

I do not think the defendant has any sound reason for objecting to the charge as prejudicial to him or as calculated to mislead the jury. We must read the charge as a verbal direction in reference to the particular facts before the court, not as a scientific treatise on the nature of privileged communications.

In Lord Bramwell's language: (*Clark v. Molyneux*, 3 Q. B. D. at p. 243) "A summing up is not to be rigorously scrutinized, and it would not be right to set aside the verdict of a jury because in the course of a long and elaborate summing-up the judge has used inac-

curate language ; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight is not to be allowed to isolated and detached expressions."

The question before us is not whether every expression is perfectly accurate, but whether there is any reason to believe that a verdict which is certainly correct and warranted by the evidence has been found against the defendant, not in consequence of being the proper conclusion on the evidence, but caused or induced by an erroneous enunciation of the law by the court.

I think the defendant had the full benefit of an explicit direction that if he spoke the words in good faith, using, as it were, and not abusing his privilege, that he was protected, and was entitled to a verdict.

There have been two trials, each resulting in the plaintiff recovering. The Chancery Division, after full consideration, refused to direct a third trial. I think they acted correctly in such refusal.

*Clark v. Molyneux*, 3 Q. B. D. 243, is widely different from the present case. It was there laid down that a person may honestly make on a particular occasion a defamatory statement without believing it to be true, because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it.

Here there is no such suggestion. The defendant at once referred to his authority for making the statement, and the authority was at once referred to, and everything connected with the matter fully discussed.

It is laid down that it is proper to tell the jury that the occasion was privileged, and unless they were satisfied that the defendant availed himself of it to make the statement complained of maliciously that they should find for defendant. I think that in effect the defendant had the benefit of a direction substantially affirming this view of the law, as will appear in the extract from his charge quoted in the Chancery Division.



I also think that the jury were given to understand that assuming the occasion privileged the defendant could not be liable unless he was shewn to have spoken with actual malice.

A non-suit could not have been properly granted. A statement is found in the evidence as to defendant saying that the plaintiff had gone up with the intention of stealing something, &c. This does not appear to have been commented on at the trial, but it is in evidence.

On the whole I am satisfied we should not interfere. I would much regret if a third trial should be necessary on so simple a question of legal direction. To some minds it might well be regarded as somewhat of a slur on our system of law. But as a mere question of right and wrong, I see no ground for interference.

BURTON, J.A.—I do not think the learned Judge's charge is altogether free from objection, but I concur with the rest of the Court in holding that we ought not to interfere in a case which has been twice tried unless we can be quite clear that the verdict is wrong.

I think it would probably result in the same way or in a larger verdict upon a charge however unexceptionable, on this ground, viz. :

The jury have found against the defendant's own evidence that he used the words.

As he denies having used the words at all, his evidence cannot go to support the defence of privilege set up.

But he is of course at liberty to say, even if the words sworn to by the plaintiff be accepted by the jury, as here, they disclose that they were used on a privileged occasion. But when a person relies on privilege he must shew that he acted on that privilege, and not in excess of it.

The defendant might have contented himself with a mere refusal to pay the wages, and if the wife had gone on to ask his reasons he would have been quite within his rights in stating them, if honestly believing in their truth, but the statement given was quite unnecessary in reply to

the mere demand. And in that respect he may possibly be regarded as a volunteer. And again, if the jury believed the wife's statement, they could scarcely, taking that evidence with the admission of the defendant that he did not then believe that the plaintiff had been guilty of the charge imputed to him, come to any other conclusion than they did in holding that the defence was not made out.

I agree, therefore, that we ought not to interfere.

PATTERSON, J. A.—I agree that we cannot properly disturb this judgment.

The peculiarities of the case are such as to make it a matter of difficulty to say how far any of the doctrines on which the claim of privilege is based can be applied to it. For my part I find it impossible to apply them as the defendant desires.

The plaintiff's wife goes to the defendant to ask for payment of wages due to her husband by the company of which the defendant is president. In answer to her demand he utters the defamatory words, saying that nothing is due because the plaintiff had stolen certain property of the company, and adding further injurious aspersions.

The defendant gave his own evidence, and all the evidence desired to be given by either party was given. The question, therefore does not arise precisely as it might have done if the defendant had relied on his objection to the proof given on the part of the plaintiff. The form of the objection in that case would have been that the occasion was privileged, and that the presumption was against the inference of malice.

There would, even in that case, have been evidence of malice for the jury in the fact that the letter to which the defendant referred as authority for the charges he made did not bear out what he said, in addition to the evidence of the manner in which the words were spoken.

But the defendant repudiates the defence that he spoke the words in the honest belief of their truth. He denies

ever having used them, and says that on all the occasions when the plaintiff's wife asked for money he invariably told her that he did not owe her, but to go to Mr. Forbes.

The jury believed that he did utter the words, and we must take that to be the fact.

"If the occasion is privileged," Lord Esher observed in *Clark v. Molyneux*, 3 Q. B. D. at p. 246, "it is so for some reason, and the defendant is only entitled to the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive."

We have here a defamatory statement, untrue in fact, not founded upon false information, but an exaggerated and colored version of information, which, if correctly repeated, would have conveyed no charge of crime, and we have the presumption of good faith rebutted by the defendant himself. He does not say that he used the occasion of the demand for money to give his real reason for refusing to pay it, honestly believing, though under a mistake, that the plaintiff had stolen the things. Yet his reliance now is on the presumption which, he argues, it lay upon the plaintiff to rebut.

Under the unusual circumstances I cannot see any reasonable objection to the charge of the learned Judge, and I cannot conceive in what way, consistently with the evidence, a charge could have been framed on which the defendant could have expected to succeed, so long as the jury accepted the plaintiff's version of the actual speaking of the words.

That was, no doubt, a question for the jury. If they were not satisfied that the words were spoken as alleged, the verdict should have been for the defendant. There was the evidence on each side, the collateral circumstance of the wife going to Mr. Forbes to see the letter being as consistent with one version as with the other, and grounds of suspicion of the simple candor of the wife not being altogether wanting, one of them being the taking her friend with her when she went to interview the defendant. But

when the jury were satisfied that the words were spoken it would be hopeless to expect them to affirm the defendant's privilege by finding in his favor a fact which he disclaimed on his oath before them.

The learned Judge is reported to have told the jury that if they believed that the defendant did tell the plaintiff's wife that the reason the company owed her husband nothing was because he stole their boat, cooking stove, and other things, the plaintiff would be entitled to their verdict unless they were satisfied that at the time the defendant made use of those expressions he did it without malice, that is to say, that he did it as a reasonable man giving a reasonable answer to a wife when she applied to him for her husband's wages.

"If you think that was the case," he continued, "then in my opinion the occasion would be privileged, and your verdict should be for the defendant. If, on the other hand, you think it was done without any reason at all, and was just simply as an insult to a woman on the street, and certainly a gross libel on her husband's character, if the defendant had no reasonable belief for saying it, why then the plaintiff would be entitled to your verdict; but if you think it was done in good faith and in consequence of the application made by the woman for her husband's wages, if you are satisfied that that was the reason, and that it was done in good faith, then, gentlemen, I should say that the occasion was privileged, and the defendant would be entitled to your verdict."

The objection taken at the trial, and afterwards urged unsuccessfully before the Divisional Court, and now renewed before us, is that the jury should have been told that it was for the plaintiff to establish affirmatively that the words were spoken maliciously.

The contention is that the proper direction to the jury would have been to the effect stated by Bramwell, L.J., in *Clark v. Molyneux*, 3 Q. B. D. 237, 243 :

"This occasion was privileged, and unless you are satisfied that the defendant availed himself of it to make the statements complained of maliciously" (with an explanation of what is legally comprehended in that word) "then you



ought to find a verdict for the defendant," and that by the language he used he led the jury to the conclusion, as Lord Bramwell considered had been done in *Clark v. Molyneux*, that the burden of proof was upon the defendant.

The case differs materially from *Clark v. Molyneux*, but the general rule there stated as applicable when defamatory words have been spoken or written on a privileged occasion will not help the defendant out of his predicament.

Our rule 311, under which a new trial for misdirection is not now a matter of right unless in the opinion of the court some substantial wrong or miscarriage has been occasioned by it, may be acted on in a case like this without fear of trenching on the functions of the jury, and without feeling that we are speculating on what, under a direction phrased as suggested by Lord Bramwell, the verdict of this jury would have been.

I do not say there was misdirection. The whole evidence was before the jury, including that given by the defendant himself, from which the opinion of the jury must have to a great extent been formed, or which at all events did not convince them of his good faith, while in the view they took of his denial of speaking the words, it afforded ground for inferring that he had not, in honesty and good faith, attempted to express what the letter had informed him of, and nothing more; to speak of the plaintiff as he was, "nothing extenuate or ought set down in malice." It must, under the circumstances be regarded as a matter of words or a turn of expression only, having no supposable influence on the result, whether the question was, are you satisfied that he spoke without malice or, are you satisfied that he made the statements maliciously?

The rule 311 should, in my judgment, be acted on, even if it were clear that the occasion was a privileged occasion. That is to my mind by no means clear, and nothing would be gained by at present discussing it with reference to the peculiar features of the case.

I agree in dismissing the appeal, with costs.

OSLER, J.A.—This case has been twice tried, with the same result of a verdict for the plaintiff; and conceding that not to be in itself a reason for refusing a third trial, it is certainly one for being very sure that there has been a miscarriage of justice on the second before setting it aside.

It appears to me that the case presented at the trial was one of the class in which a qualified privilege, so to speak, arises, and the question was whether the defendant had abused the privilege created by the occasion either by using language not called for by the occasion, or by taking advantage of the occasion to make a charge which he did not honestly believe. This was clearly a question for the jury, and there was evidence, it may be said a good deal of evidence, which could not have been properly withdrawn from them from which they might infer that the defendant was actuated by express malice, *if they believed*, as it would appear that they did, that the defendant made use of the language at all. I refer to the manner in which the defendant is said to have spoken; to the observation repeated to the wife, the “defendant came back and hollered to her that plaintiff only went up there with the intention to kill somebody or steal something;” to the fact that the letter to Forbes, the company’s secretary, which was the only possible foundation for the defendant’s making any charge against the plaintiff for stealing the boat, &c., contained no such expression, *and the further fact* that the defendant denied that he had ever made the charge, and more, that he had no belief at the time of the alleged occasion that the plaintiff had committed theft.

Taking the learned Judge’s charge as a whole, without laying too much stress upon isolated expressions, I think the real and substantial question whether the defendant was actuated by express malice was left to the jury in a manner not unfavorable to the defendant or calculated to mislead them.

I therefore think the appeal should be dismissed.

*Appeal dismissed with costs.*

## SUN LIFE ASSURANCE COMPANY V. PAGE.

*Life insurance—Conditional application—Waiver of Condition as to payment of premium.*

The defendant at the request of the local agent of the plaintiff company applied for a policy of insurance on his life and submitted to the usual medical examination, at the same time telling the agent that he was not then prepared to pay the premium. By the application the defendant agreed to accept the policy when issued, and to pay the premium. The company accepted the application and sent the policy to the agent. It contained an express notice that until payment of the premium it would be considered void; and by the rules of the company the agent had no authority to waive this condition. The agent called upon defendant with the policy when he said he was still unable to pay the premium, but told him to let it lie, and he would attend to it in a little while. Three or four weeks after this and without further communication with defendant the agent forwarded the policy to him by mail.

The defendant took no notice of it and the plaintiffs brought this action to recover the premium as due upon a completed contract of insurance and a policy duly issued.

The jury found that the defendant signed the application not intending it to be used as an application and on the representation by the agent that it would not be used without his consent.

The learned judge of the County Court set aside the finding as being against evidence and directed a new trial.

*Held, per* HAGARTY C. J. O. that there being ample evidence to sustain the finding of the jury and none to shew that the defendant had finally assented to or perfected the proposed insurance a new trial should not have been granted.

*Per* BURTON and PATTERSON, JJ.A., the action failed because it was brought upon an executed contract and there was no completed contract in fact, as it appeared by the plaintiffs' own declaration on the face of the policy that it was not to be operative until payment of the premium; and no waiver of that condition prior to or contemporaneously with the delivery to the defendant was proved.

Judgment of the County Court of York reversed.

THIS was an appeal by the defendant from the judgment of the Judge of the County Court of the county of York, setting aside a verdict rendered in favor of the defendant and directing a new trial to be had between the parties with costs to abide the event.

The facts are clearly stated in the present judgments.

The appeal came on for hearing before this Court on the 26th of September, 1888.\*

*Bain, Q.C.*, for the appellants.

*Reeve, Q.C.*, for the respondent.

\**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

November 13, 1888. HAGARTY, C. J. O.—The jury found that the defendant signed the application for insurance not intending it to be used as an application, and that he so signed it on the representation by the agent that it should not be used without his consent.

It is impossible to say that there was not ample evidence (if believed by the jury) to warrant this finding. It was fully explained to the jury that strong evidence was required to meet the defendant's written agreement. But it was, of course, open to the defendant to resist the company's claim by oral evidence that the document was obtained by misrepresentation of the agent employed by them to obtain it from the defendant.

In such a state of facts it would require some reasonably clear evidence to shew such consent and an acceptance of a policy of insurance based thereon.

The jury further find that the defendant did not accept the policy or agree to accept it when issued, or to pay the first year's premium thereon.

Now, starting with the fact established that the application or any action thereon was contingent on defendant's assent, we will refer to the evidence of the agent relied on to prove such assent and acceptance.

"I told him I had issued his policy; well, says he, I cannot take that just now, and you will have to wait awhile, like that; \* \* says I, I will call another time. I went away. I called, I think, in about two or three weeks afterwards with the policy and had a talk with him. He was alone. He told me the reason he could not take the policy just now was on account of building costing him more than he expected. However he said: 'Let that lay by and he would attend to it after a little while.' That is what he said. I said, very well, and I went away with it." He then says he sent the defendant the policy by mail on 3rd May. He thinks this was three or four weeks after the conversation—no letter was sent with the policy.



On cross-examination, the witness said :

Q. There was never a word said about when the premium was payable ? A. No, I expected when I took the policy to him that he would give me a cheque. Q. But there was not a word said about it ? A. No. Q. You did take this policy to him ? A. Yes. Q. And he would not take it ? A. No, he said not just at present. Q. And you went on and told a story of bricks out of Toronto ; do you want to repeat that now ? A. Yes. Q. What did he say about bricks ? A. The second interview I had with him about it he said he could not take the policy just now ; that it cost him rather more for building than he expected, and he could not get the brick in Toronto, and he had to send below Toronto. It cost him a good deal to get brick. Q. You are going to swear to that ? A. Yes. Q. Mr. Page never got a brick below Toronto in his life ? A. Well, some parts. Q. It was on account of the bricks ? A. Yes. Q. You took the policy away with you ? A. Yes. Q. And when you could not get him to take it, you sent it by mail to him ? A. After that time, I sent it by mail to him. Q. You knew he did not want the policy ? A. No, he only said he could not do so just then, but after a while he said it would be all right. Q. Do you mean that you sent him the policy expecting he was going to come over with the premium to you ? A. I sent him the policy expecting he would take it and pay for it.

He says he sent it by Mr. Gilbert's direction.

The defendant wholly denies the agent's evidence as to his alleged statements about asking him to call again, or that he would see to it soon ; and swears that he wholly repudiated the policy, and refused to have anything to do with it or to insure.

His evidence is corroborated by that of his wife, both as to the repudiation and as to the conditional nature of the application.

It appears to me that the finding of the jury in the defendant's favour as to the conditional nature of the application to insure, and the representation of the agent that the defendant would not be bound thereby without his assent, puts an end to the case, so long as such finding stands.

I have set out all the evidence of the agent as to any action of the defendant to get over such a finding of fact. This evidence amounts to no more, assuming it all to be true and uncontradicted, than that the defendant was not prepared to pay the premium, but told the agent he must wait till some future period, and when he called a second time he again put him off, saying he was not ready then and that he would attend to it at some future time, that after a while it would be all right.

Now what was all this beyond his exercise of his right to treat the application to insure as conditional and dependent on his own reserved right to assent or dissent to or from a perfecting of the insurance.

If the finding of the jury that he had such right be correct, he exercised it by refusing to close it till some future time.

With full knowledge of all this, the agent, or rather the company, enclose the policy to him (unexplained) by mail.

It was wholly their own doing to put it into the shape of a formal contract before his assent or concurrence had been obtained.

Assuming that he had the right to complete or refuse to complete the bargain set out in the application, I can see nothing in the evidence to shew any assent or final affirmation by the defendant.

I am unable to see on what grounds a jury could properly find that the defendant had waived the conditional character of his application or finally assented to the perfecting the proposed insurance.

He received a policy with an express notice on its face that it must be considered void till payment of the premium. It matters little whether he ever saw or read this provision. He was not bound in law to take any notice either of receipt of the policy or of the letters addressed to him.

I do not think the case calls for any discussion as to whether, if the defendant had died within the year, his representatives could have made any claim on the policy.

I repeat that the] only ground on which a new trial could be granted, would be as to the finding of the conditional nature of the application on the agent's representations.

I must say that I think the weight of evidence on this issue inclines more in the defendant's favor than against him; and I cannot see how the verdict on this point was not reasonable.

The signing of the proposal with a reservation or oral understanding that it was not to be used, or be binding until something else would be done, &c., is well illustrated in the cases on delivering of a deed as an escrow or not to be acted upon until, &c.

Two well-known cases may be noticed: *Bowker v. Burdakin*, 11 M. & W. 146, and *Millership v. Brooks*, 5 H. & N. 799.

As Parke, B., says: "though the execution of the deed was proved in the ordinary form, I now take it to be settled \* \* that in order to constitute delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution to all that took place at the time, and to the result of the transaction, and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect till a certain condition was performed, it will nevertheless operate as an escrow."

These cases are commented on in *Corporation of Huron v. Armstrong*, 27 U. C. R. 533, where the liability of a corporation for the representations of their agent in obtaining a person's signature, is discussed. It would be affectation in any one conversant with the ordinary business of life, or of the experience to be gathered from the litigation in our courts, to deny all knowledge of the importunities with which persons are often pressed on the subject of effecting insurance on life or property.

I can see nothing improbable or unreasonable in a man so pressed consenting to being examined and signing an

application on the promise and understanding that he should not be finally bound, or that it should not be enforced against him except on his final consent as soon as he found himself able to pay the premium.

This the jury, in substance, find to have been the defendant's case, and there was ample evidence to support their view.

I think most men who had made such a conditional bargain would take it for granted that as long as he did not pay or bind himself expressly to pay, the insurance could not be forced upon him.

The learned Judge, for whose judgment I have the most sincere respect, seems to me to have placed great weight on the subsequent conduct of the defendant, when the policy was executed and sent to him. I have not been able to attach equal importance to anything done or said by the defendant, on the plaintiffs' own shewing, in any way to fix any new liability on him.

I do not think the learned Judge would have interfered merely and solely on the finding as to the original conditional nature of the bargain.

I think we must allow the appeal.

BURTON, J. A.—I do not suppose that any one will seriously dispute the proposition that an application for insurance, followed by an acceptance on the part of the company with an intimation that a policy would be issued on payment of the premium, would impose more than a moral obligation on the applicant to pay the premium ; and not even that where the application, instead of being the voluntary act of the applicant, was brought about by solicitation ; but that is not this case. There was not merely an application and acceptance, but there was an agreement on the part of the applicant to accept the policy when issued and to pay the premium.

If, therefore, the plaintiffs had sued upon this agreement claiming damages for a refusal to accept the policy, I agree with the learned Judge that the findings of the jury on



several of the questions submitted to them, are so greatly at variance with the evidence and against the probabilities of the case, that I, for one, should have hesitated about interfering with his discretion in setting aside the verdict. But on reference to the pleadings, which in a case of this kind, should have been printed in the book, we find that the plaintiffs sue as upon an executed contract.

The 5th paragraph contains this material allegation :  
“ The plaintiffs duly issued the policy applied for by the defendant, dated the 6th day of March, 1886, and delivered the same to the defendant.”

This averment of delivery is not only not proved but is disproved. The policy was sent up from the Head Office to the local manager to be delivered only on payment of the premium, and by the rules of the company the local manager had no authority to waive this.

I am of opinion, therefore, that in this action the plaintiffs must fail, as there was no completed contract of insurance.

It is quite possible, and I think highly probable, that if Mr. Page had died during the year, the company would have been called upon to pay the assurance money, and unless they could have established very clearly that the Division Court suit, of which we hear, was brought without their authority, they would have unsuccessfully resisted any suit upon the policy ; but they cannot, in the face of their own declaration that the policy was not to be operative until payment of the premium, be heard to say that it was a completed contract, unless they establish waiver of the condition prior to, or contemporaneously with the delivery to the defendant.

On this ground, I think the action should be dismissed.

PATTERSON, J. A., concurred.

OSLER, J. A., concurred in reversing the judgment on both grounds.

*Appeal allowed with costs.*

## O'SULLIVAN V. LAKE.

*Action for negligently valuing land—Misdirection—New trial granted in discretion of Court—Practice*

The judgment of the Common Pleas Division, (15 O. R. 544) affirmed on other grounds.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, directing a new trial to be had between the parties, and came on to be heard before this Court on the 29th and 30th of November, 1888.\*

*S. H. Blake*, Q. C., and *Anglin*, for the appellant.

*Robinson*, Q. C., and *Maclaren*, for the respondent.

The facts appear in the report of the case in the Court below, reported 15 O. R. 544.

January 8th, 1889.—The judgment of the Court was delivered by

HAGARTY, C. J. O.—The majority of the Court are of the opinion that there was no misdirection in the charge of the learned Chief Justice Cameron at the trial. The circumstances are, however, very peculiar. Affidavits were filed in the Court below as to certain matters, which the defendant pressed upon the Court required explanation beyond what had appeared at the trial. We have, therefore, come to the conclusion that it is better not to interfere with the order of the Court below, directing the case to be submitted to the consideration of another jury, and we abstain for that reason from expressing any opinion on the merits. We are further of opinion that the appeal should, under all the circumstances, be dismissed without costs.

*Appeal dismissed without costs.*

\**Present*—HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.

NOTE.—The plaintiff carried the case to the Supreme Court of Canada, when the appeal was quashed on the ground that the new trial had been granted as a matter of discretion, but the defendant was refused his costs, the objection as to discretion not having been taken until the hearing.

## DERINZY V. CORPORATION OF OTTAWA.

*Municipal Corporation—Highways—Surface Water—Lands injured by works of corporation—Liability of corporation.*

An action lies against a Municipal Corporation where by the means of their works in grading their streets or otherwise they cause surface water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper care in performing the work such injury might have been avoided.

The Corporation of Ottawa, in the exercise of their right to make drains and ditches to carry off surface water from several streets in the neighbourhood of the plaintiff's property, so negligently executed the work as to cause damage to the plaintiff by the overflow of the surface water upon his lands.

In an action brought therefor the learned trial Judge nonsuited the plaintiff. The nonsuit was subsequently set aside by order of the Divisional Court, costs of the first trial and of the order to be costs in the cause to the plaintiff in any event. On appeal to this Court the judgment of the Divisional Court was affirmed with costs. [BURTON, J.A., dissenting.] *Per* BURTON, J.A.—There was no evidence of negligence, and on that ground the nonsuit should be upheld.

THIS was an appeal by the defendants the Corporation of the City of Ottawa from a judgment of the Queen's Bench Division.

The statement of claim set forth that plaintiff, being a florist and market gardener, became lessee of lot No. 12 and the adjoining lot D., on the north side of Rideau Street in Ottawa, for five years from the 6th of June, 1883; with a right of purchase during the continuance of the lease, having a dwelling house and hot houses on the property in which he had carried on his business; and alleged that by reason of the negligent manner in which the city had constructed certain surface drains on the said street large quantities of water which would not otherwise have flowed upon the plaintiff's land were collected from several streets and adjoining lands and discharged upon the plaintiff's premises, whereby the same were overflowed and submerged, and the plants, flowers, and other crops of the plaintiff were injured, damaged, and destroyed, and claimed \$1,000 damages in respect thereof.

The defendants by their statement of defence denied that they were guilty of the negligence complained of and

submitted that the matters alleged in the statement of claim did not give plaintiff any right of action, and claimed the same benefit as if they had demurred.

The action came on for trial before Rose, J., on the 13th of November, 1885, when on application of the defendants they were allowed to add a paragraph to their statement of defence, alleging that if in the making and construction of the streets, they by negligence or otherwise caused the flooding of plaintiff's land they had for more than 20 years before the commencement of this action by the means and in the manner charged in the statement of claim overflowed and flooded and had been accustomed to overflow and flood the land of which the plaintiff was tenant as alleged.

After hearing the evidence adduced, the effect of which appears in the present judgments, the learned Judge directed a nonsuit to be entered.

In the following term the nonsuit was ordered to be set aside and a new trial to be had between the parties; costs of the first trial and of the order to be costs in the cause to the plaintiff in any event.

The appeal came on to be heard before this Court on 31st of March, 1887.\*

*McCarthy*, Q. C., for the appellants.

*Allan Cassels*, for the respondent.

May 10, 1887. HAGARTY, C. J. O.—As the pleadings stood at the trial the claim can be put in Mr. McCarthy's words in asking for a nonsuit :

“ The claim is deliberately founded upon the fact that in constructing and repairing Daly, Nelson, Rideau, and Besserer streets, the corporation have negligently made surface drains and water courses along and upon the surface of the said streets, and each of them, whereby large quantities of water which would not have otherwise flowed on his premises.” \* \*

*Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.



This allegation, if proved, would form a cause of action.

I do not see how, with the testimony of the plaintiff's witnesses before us, we can say that there was no evidence to leave to the jury on this head; the evidence of the first witness, Edward Snare, civil engineer, if true, and uncontradicted, would, as I read it, have made out the plaintiff's case.

He states that, but for the grading and gutters, or side drains on Rideau street, the water in its natural flow would not reach plaintiff's premises in the quantities that it now does; that it would run chiefly in a north westerly direction.

He says the water channels conduct a good deal of water on to his premises. There is no grating at the corner, where the plaintiff's premises are, to carry water into the drain below the street, and its only channel to escape is on to the low land north of the side walk, which is there much lower than the centre of the street on the north side, the south side being much higher than the north; that the sides of the gutters or side drains are imperfect; opposite plaintiff's land the side walk is very much lower than the centre of the road; that the street has been raised by the defendants within the last five years; earth has been carted on to it; opposite the plaintiff's premises the water gets under the side walk and runs on to him; that were it not for Rideau street and its construction and water-ways, the water would flow in a north-westerly direction; that the construction of the water-ways on Rideau street brings the water down to Nelson street, and that otherwise it will not come there; that the effect of the filling up of Rideau street has been to bring water on to the plaintiff.

*Samuel James* says, that Rideau street has been levelled and raised in many places; twenty years ago there was no side walk on the north side at plaintiff's premises.

The whole of the block is low between King and Nelson streets, but the north side would not have been any lower than the south side if the street had not been raised; that

a grating at the corner of Nelson and Rideau streets, would stop the water a great deal.

*Bradbury* says, no means of escape for the water coming down Rideau street till it gets to the plaintiff's land. The cause of the water coming to that point is the want of proper gratings—catch drains, and the water is conducted down by the side channels.

*Ellard*, civil engineer, in the course of his evidence, gives the following testimony:

Q. In point of fact, as I understand you, there is so much water brought to Rideau street that the channels on Rideau street are not sufficiently deep or broad to carry it off so that at times it overflows right and left?  
A. It overflows to the north.

Plaintiff, in the course of his examination, says, that if there had been a grating put in at his place, he is sure it would have prevented the flood on him.

I have a very strong opinion that there was evidence to leave to the jury. It is quite unnecessary to express any opinion as to its credibility; but I think the jury should have decided upon it.

I see nothing in the fact that these streets had been originally laid out by the Government.

The defendants are charged with negligently constructing, repairing, and making the surface drains, &c. The defendants have to take the land as dedicated for a public highway, but the dealing with it so as to make it a safe and proper street for a city, rested wholly with them. It might be an argument to be urged on their part that they had not the selection of the line of the street, and that the level of this ground, &c., made the performance of this statutable duty more difficult.

It seems to me to be clear that in the opinion of the plaintiff's witnesses, proper precautions had not been taken in the conduct of the water along Rideau street.

The learned Chief Justice of the Queen's Bench, has very fully pointed out the apparent duty of a corporation in the management and drainage of roads and streets, and I am not at present prepared to differ from his view.

Certain legal questions were raised by the defendants' counsel—the main one being, that the case disclosed no liability on the defendants to the plaintiff; that they only did their duty in changing the grade of the street, and in making side drains for the water which, from the level of the ground on which Rideau street was laid out, naturally flowed there.

But before a municipality can raise the question of non-liability to a person on whose land their drains discharge water that would not otherwise be there discharged, they must at least shew that they have done their work without negligence; and that due care was used to discharge what they say was their statutable duty in the drainage and management of this highway. The plaintiff's witnesses point out what they consider to be faulty and negligent construction and management to the plaintiff's detriment.

Here the defendants seek not to disprove the charge, but to shelter themselves under their alleged public duty.

If they had succeeded in disproving all charges of negligence, they could then be in a position to raise the very serious question whether a private person may be ruined by their action for the general benefit of the public.

As far back as 11 U.C.R. 89, in *Brown v. Corporation of Sarnia*, the late Sir J. Robinson says:

“The plea cannot be a sufficient defence unless we admit that the municipal authorities in order to drain a highway, may bring down water in any quantity upon the land of an individual, and may leave it to rest and stagnate there, or even to produce any amount of evil, &c., to his dwelling-house, &c., without shewing that the water could in no other way have been got rid of without throwing it on the plaintiff's land, and without shewing that it was not in their power to lead it away from the plaintiff's land after they had conducted it thither.”

This language is peculiarly applicable to this case.

In *Perdue v. Chinguacousy*, 25 U. C. R. 61, the last case is noticed and followed. The Court do not decide the main question now being discussed remarking:

“Without positive legislation, a grave doubt may be expressed as to the absolute right of the conservators of a highway to flood a man’s land and destroy his property even if no other method of drainage be attainable. Generally, if public convenience requires the destruction of private property, the owner of the latter has the right to be compensated.”

In *Rowe v. Rochester*, 29 U. C. R. at 595, the present Chief Justice of the Queen’s Bench, delivered the judgment of the Court, denying the right of the corporation to throw water on plaintiff’s land to his injury, even though they did the work in the most scientific and skilful manner, and though it may have been absolutely necessary to drain in this manner to make a good road.

The same case came up in 22 C. P. 319, and the same rule is noticed.

In *McGarvey v. Strathroy*, 10 A. R. 631, in this Court the general question was noticed, but negligence was averred and proved, and the case did not call for its decision.

I do not think we are called on at this stage of the present case to discuss it further.

I cannot see how on the evidence adduced, any defence can arise on the plea added at the trial of a twenty years use of the right to overflow the plaintiff’s land.

Nor can I accede to the argument that the plaintiff can be barred by his voluntarily coming to reside and build a green-house, &c., on land known to be previously liable to be flooded.

I think the appeal must be dismissed.

PATTERSON, J. A.—I have no difficulty in holding that on all the questions of fact material to the maintenance of the plaintiff’s action, there was evidence for the jury; the weight or value of the evidence being of course for the jury and not the Court to decide, so long as it goes beyond the scintilla rule.

There was direct evidence that the water which, after a heavy rain, ran down Rideau Street, sometimes flowed on



to the plaintiff's lot, the water being conducted by surface drains or water-ways at the sides of the road leading to the lowest spot, which is at the intersection of King Street, where there was a grating into the main sewer, but overflowing those drains on its way and escaping on to the lower level of the plaintiff's lands; the water even flowing across the street from the south to the north, opposite or in the neighbourhood of the plaintiff's land.

There was also evidence, open perhaps to more question on the score of the reliability of the witnesses and their means of knowledge, but still, as I think, proper for the jury to pass upon, that more water was brought to the plaintiff's land by these water-ways than would have come there before the streets were constructed; and even if the land does not get a larger share of the thunder shower than it would have got in the old days which nobody remembers, the evidence would, in my judgment, justify the inference that it gets it in a shape that does damage which, in the natural state of things, would not have been done.

I do not think I could put this tendency of the evidence better than I find it put by the learned counsel for the city in his argument at the trial, as it is noted by the shorthand reporter. Remarking on the fall of the ground towards the plaintiff's locality, he is reported to have said, "so it is perfectly inevitable that this water which would have flowed scattered over the place according to the inequalities of the ground in a state of nature, is now forced into these streets and must go to Rideau Street, and so at times inevitably overflow at places according to the volume of water and according to the rainfall." I am not at this moment dealing with this last observation or the argument from the facts, but am simply noting the bearing of the evidence on one of the issues of fact.

Now, if there was, as I think there was, evidence of these facts for the jury, we have to discuss the question of the liability of the defendants on the basis of the other facts on which the evidence does not admit of dispute, and

the assumption of a finding of the disputed facts in the plaintiff's favor.

In this way the story is, that the streets in question are allowances for roads made more than forty years ago by the crown surveyors in the town of By-town, and became by statute public highways; that they were formed into streets, Rideau street, at all events, being constructed in all material respects as it now exists, many years before the plaintiff had any connection with his present lot; and that from the time of their construction they have conveyed water to the lot in the same manner and to as great an extent as since the plaintiff's occupancy.

The plaintiff is tenant of the lot on a lease for five years from June, 1883, at \$40 a month.

The city council is not charged with any default in its duty to keep the street in repair. The street, for all purposes of a highway, seems to be well made and in good order. The account of it given by Mr. Snare, a civil engineer, and a witness for the plaintiff, though in some respects rather indefinite, I understand generally to be that the roadway is raised to some extent above the natural level of the ground; but whether more than the result of shaping and metalling the roadway, seems not clearly stated. The ground falls pretty rapidly from south to north. Rideau street runs east and west. The plaintiff's lot on the north side of the street is some three feet lower than the street, and the gutter or waterway on the north side of the street is about eight inches lower than the crown of the road, and is some inches lower than the gutter at the south side.

The charge is negligence in the construction of the street, not with regard to the public, but with regard to the plaintiff individually. The allegations in the statement of claim are that, in constructing and repairing Daly Street, Besserer Street, Rideau Street and Nelson Street, they negligently made surface drains and water-courses along and upon the surface of the streets, whereby large quantities of water, which would not otherwise have

flowed upon the plaintiff's land, were collected from the streets and adjoining lands and discharged upon the plaintiff's premises.

There is an allegation that there was an underground drain in Rideau Street sufficient to carry off the water if proper gratings had been made opening into it, but that, I apprehend, does not add to the legal effect of the general charge.

The essence of the complaint is, that the defendants, by means of their works, brought water to the plaintiff's premises, without providing for carrying it past and away from him; and the injury is not charged as the inevitable or ordinary consequence of the making of the road, but as something that might have been avoided by the exercise of such care as the plaintiff asserts it was the duty of the corporation to exercise.

A charge of negligence in the construction of highways, producing injury by flooding some one's land, is not by any means a novelty with us. We find the right of action sustained by a series of decisions reaching back for over thirty years, as in *Brown v. Sarnia*, 11 U. C. R. 89; *Croft v. Peterborough*, 5 C. P. 35 and 141; *Perdue v. Chinguacousy*, 25 U. C. R. 61; *Rowe v. Rochester*, 29 U. C. R. 590; *Rowe v. Rochester*, 22 C. P. 319; *Stonehouse v. Enniskillen*, 32 U. C. R. 562; and recognized in others, such as *Hodgins v. Huron and Bruce*, 3 E. & A. 169; *McGarvey v. Strathroy*, 10 A. R. 631; and *Re Nickle and Walkerton*, 11 O. R. 433; but none of those decisions cover all the questions suggested by the circumstances now before us.

The cases decided on demurrer, being four out of the six in which the point was directly raised, called for no discussion of various questions apt to arise at *nisi prius*, where the facts have to be proved and found by the jury. In the other two we have a statement of the special findings of the juries which it may not be amiss to quote. I read first from the judgment of Sir J. B. Macaulay in *Croft v. Peterborough*, 5 C. P. 141, at p. 148:

“The second count, without imputing wrongfulness in raising the road, alleges negligence in the execution of the work. To this the defendants plead “not guilty,” thereby denying the breach of duty or wrongful act alleged. Now, the breach of duty or wrongful act alleged is, that the defendants raised the street in a careless and negligent manner—that is to say, raised a solid line of road without making any drains or culverts or adopting any other sufficient means to carry off and away from the plaintiff’s house the water which would otherwise flow and did flow from the street so raised into his house and shop, as it was their duty to have done. There was evidence of the want of precaution alleged, and of the consequences, and the jury found that the defendants had not constructed proper drains to carry off the water from the plaintiff’s premises, for the want whereof the plaintiff was damnified. On this count and plea, therefore, the plaintiff seems entitled to a verdict.”

In *Rowe v. Rochester*, 29 U. C. R. 590, Wilson, J., who gave the judgment of the Court, expressed his own opinion that the defendants were liable without allegation or proof of negligence; but that cannot be taken to be the judgment of the Court, because negligence was charged by an amendment of the declaration after it had been expressly found by the jury. The note of the finding is at page 592 :

“The jury found on questions left to them, that the defendants, by cutting or deepening the ditches to drain the roads, had thrown water on the plaintiff’s land to his damage, and that they could, by reasonable exertion, have made the drains for the improvement of the roads without injury to him.”

The general principle on which the liability of the corporation rests is the same on which *Coghlan v. Ottawa*, 1 A. R. 54, was decided in this Court ten or eleven years ago; the great modern leading case on the subject being *Fletcher v. Rylands*, 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; and the important question is, how that principle is to be applied in this case in view of the duty of the council to keep the roads in repair and of the obli-



gation to "make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work." 46 Vict. ch. 18, sec. 486 (O.)

One point taken for the defendants, was that the plaintiff's remedy was under this compensation clause and not by action; and the following language of Lord Chelmsford in *Ware v. Regent's Canal Co.*, 3 DeG. & J., 212, 227, was cited to us: "But if damage to the plaintiff's lands has been the inevitable result of the proper execution of the works, causing an occasional flooding in contradiction to a permanent submerging, then he must be left to his remedy under the 68th section of the Lands Clauses Consolidation Act, which would alone apply to his case according to the authority of *Broadbent v. The Imperial Gas Co.*, 7 DeG. M. & G. 436."

It seems, however, very clear that we are not now required to consider in what cases the compensation clause affords a remedy or excludes other remedies.

This action hinges on the question indicated by Lord Chelmsford in the passage I have just read: was the injury "the inevitable result of the proper execution of the works?" or, conversely, were they executed so negligently as to occasion injury, which would not have resulted if they had been properly executed?

It may be that, under particular combinations of facts, questions may arise touching the general application of the compensation clause, read in connection with the arbitration sections 393, etc., in their present form, to all cases in which lands are injuriously affected by the exercise of the powers of municipal councils; but whether any particular case comes within the statutory remedy or remains as before 1873, while compensation was provided only in respect of lands taken or entered upon, the corporation cannot be liable to an action for damages happening from

works executed in the discharge of a duty imposed by statute and with proper skill and care.

So far, I think, the matter is plain enough. But it may not always be easy to say what is proper skill and care.

Whatever general rule is formulated must apply to all municipal corporations alike, to those of remote and thinly-settled townships as well as to city councils.

No rule is better settled or more familiar in actual practice than that the statutory mandate that "every public road, street, bridge and highway shall be kept in repair by the corporation," is to be interpreted with reference to the widely varying conditions and requirements of different localities; and the rule or criterion of care or negligence such as we are now discussing must, as it strikes me, have something of the same flexibility.

A highway may, it is true, be sufficient for public travel and yet create a nuisance. The roads, in *Croft v. Peterborough* 5 C. P. 35 and 141, and *Rowe v. Rochester* 29 U. C. R. 590, were most likely good roads, yet they did actionable mischief. But so long as the duty of a council in making and maintaining roads is gauged partly by the means at its disposal, and to the extent of that duty it is bound to keep the roads in repair, it could not reasonably be held liable, absolutely in and regardless of expense or of the means at command, to provide against the water escaping in times of freshet from the ditches, which are an essential part of road-making, and which in ordinary times may be quite sufficient. A more rigid rule of duty might, no doubt, be imposed, such as was held to exist in *Ruck v. Williams*, 3 H. & N. 308, where certain Improvement Commissioners were held bound to provide against the event of a great storm happening once in fifty years; but I take it that the duty in question at present is one which must be judged of in each case with reference to the circumstances.

If, after exercising all the care and doing everything reasonably required under the circumstances, of which the jury has always to judge, the inevitable effect is to injuriously affect some one's land, the remedy would have to be

sought under the compensation clause, if it applied. See *Ferrar v. Commissioners of Sewers*, L. R. 4 Ex. 1; *The Queen v. Vestry of St. Luke's*, L. R. 7 Q. B. 148. It is worth noticing that that clause itself provides only for the excess of injury over consequential benefit from the work.

I make these remarks with reference only to the discharge of the ordinary statutory duty to keep the works in repair, and without attention to the different considerations which might arise where alterations or improvements are undertaken, such, *e. g.*, as were in question in *McGarvey v. Strathroy*, 10 A. R. 631; or if the council choosing between two modes of doing the work, should formally and by by-law decide upon the one by which land adjoining the road, would be injuriously affected; or which might arise in other phases of the exercise of the powers of the council.

I have no idea of laying down the proper charge to be given or questions to be left to the jury in this case. I do not know what evidence may be given at another trial; or what further evidence might have been given at the last trial. The time when and the circumstances under which the roads were made, and even the extent and nature of the work done on them of late years, were not definitely explained. There was reference to sewers under the streets; but when they were made, was not fully shewn, and at all events, they came only indirectly into the discussion. The right of the plaintiff, coming in as he did in 1883, to maintain the action, though touched on in argument before us, does not seem to have been made a distinct question at the trial, and any attempt now to form an opinion on it, would be on imperfect or perhaps mistaken data. Upon the evidence as adduced at another trial, the questions may be narrowed or may assume a different aspect.

My object now is mainly to guard against appearing to hold that the duty to protect the plaintiff against his present cause of complaint is necessarily an absolute duty,

or indeed that the plaintiff can insist that any duty towards him in his relation to this land has been violated. It may be that when the circumstances are fully shewn, the duty will be put beyond question, and will appear to be practically absolute, but I consider that those questions can only be properly pronounced upon in view of ascertained facts and circumstances. *Primâ facie*, I should say in view of the circumstances under which the work was done which caused the injury, whether that was the original construction of the streets or work of later date.

I agree that the case ought not to have been withdrawn from the jury, and that, therefore, we must dismiss the appeal.

OSLER J. A., concurred.

BURTON, J. A.—I am of opinion that the nonsuit entered by the learned Judge at the trial was right, and should not have been interfered with.

I have carefully read the evidence and the judgment of the learned Chief Justice in the Court below, and am unable to find any evidence which it would have been proper to submit to the jury as evidence from which negligence or actionable damage on the part of the defendants might properly have been inferred.

In order for the plaintiff to recover against the defendants, there must be shewn some duty or obligation on the defendants which they have omitted or neglected, or in the performance of which they have misconducted themselves or acted negligently and that by reason of their negligence damage has accrued to the plaintiff; if, therefore, we interfere with this nonsuit, we ought to point out very clearly, (so as to prevent a second miscarriage) in what respect the evidence points to a duty on the part of these defendants which they have omitted, or evidence which goes to show that the work which they were bound by law to perform, has been done in a negligent or improper manner.



Before proceeding to deal with the evidence, it is as well to give a short outline of the undisputed facts.

The plaintiff's land lies much lower than the ordinary level of land about it, and consists of a lot at the corner of Rideau and Nelson streets.

The natural trend of the ground in that part of the city of Ottawa, is a slope from the south and south east northerly, and in its natural state, the waters from the higher land to the south would overflow this particular property, and would, as it lies lower than other lands about it, leave water upon it after every heavy storm.

The streets were laid out by the government about forty years ago, and were constructed presumably by the defendants, but for aught that appears, they may have been so constructed by the owners of the adjacent land more than twenty years before the injury in question, and not a single witness proves that more water is now brought on the plaintiff's land than was brought there before the streets were constructed.

The work that has been done since the roads were originally constructed, consists of the ordinary repairs which the defendants are bound to make in the *bonâ fide* execution of their public duties; and it is admitted on all hands that this has been done in a proper manner. There has been no change of level or grade beyond that absolutely necessary in forming the crown of the road.

The plaintiff, in his depositions, admits "Rideau street was raised a few years before I went to live on the lots. It has not been raised since; no change has been made in either Rideau street or Nelson street to my disadvantage since I have lived there."

Although the principal witness for the plaintiff speaks rather flippantly of more water being brought upon the land by the construction of the street than formerly, he had no more knowledge than I have of how the water flowed before the construction of the street, and when we find him making the statement that if the street were not raised in the middle as it is, but was on a level, the

slope being from the south, there would not be as much water go over the plaintiff's land as now, his evidence does not commend itself to one as very logical, although that is a matter with which we are not dealing at present ; but assuming the fact to be that more water is brought upon the plaintiff's land than before the construction of these streets, of which there is literally no evidence, I fail to see how that would give a cause of action in the absence of negligence in the construction of the work itself ; the plaintiff might not be remediless, but might be entitled to compensation under the compensation clauses of the Municipal Act.

It is, however, quite possible that even under the law as it now stands, the Legislature deemed it reasonable that compensation should not be given in a case like the present where the corporation was merely performing the statutory duty imposed upon it of keeping the streets in repair, and confined it to those cases only where it required some legislative action on the part of the council to justify the work.

I have, upon consideration, although I at first inclined to a different view, come to the conclusion that it was not their intention, in such a case as this, to give compensation, and for the following reasons :

It is quite clear that before the change in the law first effected in 1873, and now to be found in sections 486 and 398 of the Municipal Act, no action would lie against the corporation as for a wrong at the suit of a person whose property was injuriously affected by an act done under the general powers, or under a by-law, so long as the work was done in conformity with the power and without negligence.

The Act of 1873, sec. 373 is sec. 486 of the present law, might seem at the first blush, to give compensation in the case of consequential injuries in all cases, but when read in connection with sections 389 and 393, it seems very doubtful whether the Legislature did not intend to leave them without remedy in a case where the

municipality is merely carrying out their general power of keeping the highways in repair ; for instance, section 486 refers to the *contemplated work*, and section 393, whilst using the words injuriously affected, shows that it refers to some work done under a by-law ; and there is no provision to be found in any part of the Act which renders it compulsory on the council to appoint an arbitrator except in such cases. It would seem, therefore, to be a *casus omissus* or a deliberate determination of the Legislature not to give compensation in such cases, but it cannot affect the question we have before us of an action lying in such a case.

Where a statute authorizes a thing to be done, and does not expressly authorise compensation, then the doing of the thing authorised, is *damnum absque injuriâ*, and the plaintiff is without remedy.

See the *Governor, & Co., of the British Plate Manufacturers v. Meredith*, 4 T. R. 794, which is the earliest case on the subject ; *Dungey v. The Mayor of London*, 38 L. J. C. P. 298, which is, I believe, the most recent.

If the law throws this obligation upon the defendants performing a public duty and deriving no advantage to themselves personally, and the work itself has been done properly, they cannot be liable to be sued.

The law is briefly, but very correctly stated in a few words in *Hodgins v. Bruce*, 3 E. & A. 169, thus :

If, however, the defendants have done their work so negligently and unskilfully that by reason thereof the plaintiff has "sustained special damage, he may, notwithstanding the statute, still maintain an action for redress in respect of the special damage resulting from the negligence."

The same rule appears to have been adopted in all the States of the Union with the exception of Ohio. In *Alexander v. Milwaukee*, 16 Wis. 264, one of the Judges states the law thus :

"I concur in the decision of the Court that by the weight of authority a municipal corporation or public

agent, acting in pursuance of law and with due care and skill, is not responsible for consequential injury to property which has not been actually taken for public use, occasioned by the construction of a public improvement, though such consequential injury would, if caused by an individual or a purely private corporation, constitute a good cause of action."

But the learned Chief Justice in the Court below, assumes that there was evidence of negligence inasmuch as the defendants had not afforded means of carrying off the water from the gutters on the side of the road by underground drains, or that there was a breach of duty on their part in not undertaking to make these underground drains, or to make drains to connect with them; in other words, that an action lies against the municipality for omitting to put into operation its legislative powers.

I think no such duty is cast upon the defendants.

I am quite free to admit that if the defendants had raised the road making an embankment as it were without culverts or drains under it so as to enable the water to pass under it as it was accustomed to flow, and thereby to pen it back upon the plaintiff's premises, that would be negligence in the construction of the work itself, which would give the plaintiff a cause of action. That was the state of things found to exist in *Croft v. Peterborough*, 5 C. P. 35 and 141, an interference with the flow of the water, which might have been prevented if the work had been properly constructed; although there was the additional element in that case that the work was unauthorized, no by-law having been passed as was necessary, it not being a work which the municipality had power to do under the statute, but work which they were only authorized to undertake after the passing of an enactment on the subject by their governing body.

In the present case, it was admitted over and over again during the trial, that the work was not only properly constructed for the purpose of a travelled road, but no fault was found with its construction in any respect;



the south side of the road being higher than the north, the construction of culverts so far from relieving, would have a tendency to bring down more water on the plaintiff's land.

There is nothing to show that any possible change in the construction of the road would have been more beneficial to the plaintiff, or that any mode could have been resorted to to prevent an overflow in case of freshets, a sewer along both streets with inlets at short intervals, might diminish the evil to some extent at the expense of filling the atmosphere with sewer gas. Upon what ground then are they to be made liable to an action?

They are bound by law under all circumstances to keep the streets in repair, and if damage results from that lawful act, the remedy, if any, is by compensation; but they are not bound to make underground drains or to make connections with them if they exist so as to carry off surface water.

Such a case was expressly decided in New York, *Wilson v. New York*, 1 Den. 595, where the city raised the grade of streets, forming an angle on two sides of the plaintiff's premises without making any drain or sewer, and thereby obstructed the natural flow of water, and caused it to run from the street and from the adjacent land upon hers, and to stand there several months in the year. In her declaration she alleged that the work had been carelessly done, but I suppose that she failed to sustain this allegation in evidence for the Court held it was *damnum absque injuriâ*.

The plaintiff's complaint is in the following words:

"3. The defendants for several years before and since the said 6th day of June, 1883, in constructing and repairing Daly street, Besserer street, Rideau street, and Nelson street, in the said city of Ottawa, negligently made surface drains and water courses along and upon the surface of the said streets, and each of them whereby large quantities of water which would not otherwise have flowed upon the plaintiff's said premises, were collected together from the said streets and adjoining lands, and

were from time to time and at divers times during said term of the plaintiff, discharged upon the said premises of the plaintiff, thereby overflowing and submerging the same.

“4. Although there were in the said streets and particularly in Rideau street, aforesaid, underground drains sufficient to carry off the said surface water and prevent the same from doing injury to the said premises of the plaintiff, had sufficient grates and openings been made for carrying off the said surface water and allowing the same to escape and empty into the said underground drains, yet the defendants negligently neglected and refused, although often requested to make such grates and openings into the said underground drains for carrying off the said surface water as aforesaid, but on the contrary, negligently suffered, permitted and caused the said surface water so by them gathered and accumulated as aforesaid to discharge, flow upon and into and submerge the said premises of the plaintiff, as aforesaid and his dwelling-house, hot-houses, and garden thereon.”

The corporation undertook nothing in reference to these so-called drains or gutters beyond leaving them as usual on either side of the raised road way; if it is part of the undertaking, there is nothing to show that they were not made in a skilful and proper manner. These gutters, sufficient for all ordinary rains, become inadequate to carry off immediately the waters of a large freshet, not by reason of any faulty construction or obstructions in them, but, because to carry off such an extraordinary freshet, would require gutters of nearly if not fully the width of the street, so that in effect the plaintiff's complaint comes to this, that although at one time these gutters were sufficient to carry off the surface water, and are still sufficient except in times of long continued rains or freshets, yet that now partly it may be by the grading of the streets, and because the town is becoming to be more densely built up, and therefore the water accumulates more rapidly than formerly, the city is bound, as is contended in the complaint, to construct sewers for its removal.

But there is no such duty cast upon them and the councils, are and ought to be the sole judges of how the

drainage is to be done. The Legislature has given them full discretion in such matters, and it would be a mistake and a misfortune to substitute the judgment of a jury for those of the body to whom the duty and the discretion are especially committed by law.

If this is to be called negligence, I see no escape from the necessity of submitting the propriety of all acts of grading and draining in all our municipalities to the decision of juries, and then we shall have our municipal matters regulated and controlled not by the responsible representatives of the ratepayers duly elected as the Legislature intended, but by a body of jurymen without any special knowledge on the subject, not interested in the matter, and having necessarily to decide in a hasty way.

I would also remark that this being only surface water, which Lord Tenterden speaks of as a common enemy which every proprietor may fight or get rid of as best he may, there was nothing to prevent the plaintiff erecting any barrier upon his own premises to prevent its entrance upon his land.

I quite agree that the municipality by reason of its control over streets, and the power to grade and improve them, have no legal right intentionally to divert the water therefrom, and discharge it by artificial means in increased quantities and with collected force upon an adjoining property, and that I fully approve, therefore, if I may say so without presumption, of the correctness of the decision of the late Sir John Robinson in *Brown v. Sarnia*, 11 U. C. R. 89.

It arose upon demurrer, and it amounted to this, that the corporation had diverted the water from the swamps near the plaintiff's premises, and which previously did not flow over the plaintiff's land by cutting a ditch and throwing the water upon it. The act was in fact in the nature of a trespass without any sufficient justification.

So far as *Perdue v. Chinguacousy*, 25 U. C. R. 61, follows the lines of the decision in *Brown v. Sarnia*, I concur in it, but I dispute its application to a case like the

present, where the defendants did not do an unauthorized act, as in *Brown v. Sarnia*, but have merely done what they are authorized and compelled by Act of Parliament to do, and which they have done, as is conceded, skilfully and without negligence, or have omitted to do something which it is entirely discretionary with them to do or not.

In *Perdue's* case, the decision proceeded a good deal on the form of the plea in not sufficiently confessing and avoiding the injury complained of; but if it was intended to decide that a municipal authority had no power in order properly to construct or repair the highway to carry the surface water into a public stream or watercourse which crossed the highway and passed through the plaintiff's land, I should dissent from that decision.

I think the plea in that case did not answer the cause of action set forth in the declaration, and was bad on that ground.

The distinction between incidental injuries resulting from acts which the municipal body is bound by law to do and direct injury accomplished by a corporate act which is in the nature of a trespass as in *Brown v. Sarnia*, is well pointed out by Chief Justice Cooley in *Ashley v. Port Huron*, reported in 35 Michigan Reports.

After referring to a number of cases in which no action was held to lie for consequential injuries arising from doing an act which it was incumbent upon the corporation to do, he refers to *Myles v. Brooklyn*, 32 N. Y. 489, and the comment made in that judgment upon a number of cases in which the municipality had been held liable, pointing out that they were all cases where the injury was either the result of suffering a municipal work to be out of repair, or where the defendant had done acts which were in themselves positive nuisances, but furnished no ground for holding a municipal corporation responsible for not providing suitable sewerage, whether the neglect was total or partial only, arising from the insufficiency of a sewer to discharge all the water which it was intended to carry off; and he then points out that the like injuries might result



from a failure to construct any sewers whatever, but that clearly no action could be sustained for a mere neglect to exercise a discretionary authority. He points out the difference between such cases and *Brown v. Sarnia*, and similar authorities which recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him.

The case of incidental injuries where the defendants confine themselves to the premises where they had a legal right to work, is very distinguishable; and I may say that in *McGarvey v. Strathroy*, 10 A. R. 631, I placed my decision solely upon the ground that negligence was alleged and found, and I adhere to that opinion.

*Stenmeyer v. The City of St. Louis*, 3 Mo. App. R. 256, is in many respects very similar in its circumstances to the present, although there existed much stronger grounds than are alleged here for making the defendants liable. There was no allegation in that case, and there is not in this that the grading of the street was done in a careless or unskilful manner; but it alleged that by the grading the vicinity of the plaintiff's premises, became the lowest point in the area drained by an existing sewer; and that thus a large body of surface water gathered in front of the plaintiff's premises in case of heavy rains. And it then went on to allege that the water thus collecting in increased quantities after the grading was done, the sewer became insufficient to carry it off, and the damage was produced.

The Court there held that, as it appeared that the sewer was well constructed and sufficient when constructed, the fact that the defendants did not enlarge the sewer so as to enable it to carry off the increased quantity of surface water which the new grading caused to accumulate, gave no cause of action.

If it is intended, although not so alleged in the complaint, to treat this as an action for negligently repairing

the highway, it fails for want of any evidence; and in the face of the admission of the plaintiff's counsel at the trial, that there was no such negligence. If it is placed on the ground that they negligently made surface drains, and that, although often requested, refused to make drains to connect with the underground drains, it fails both on the ground that it is not shown that they undertook to make any surface drains at all, and because an action will not lie against a municipality for refusing to pass a by-law which would be necessary for such a purpose.

If the level of the street was at any time raised it was as the plaintiff admits, long before he acquired the property, and he could not by the purchase of the property acquire any right to bring an action which the previous owner did not care to bring; all that occurred since his acquisition, was the repairing of the highway, which in times of freshets may have the effect of throwing a greater quantity of water on his lot.

Most of the cases are reviewed in the case of *Fleming v. Manchester*, 44 L. T. N. S. 517; and in that case a reference is made to Lord Blackburn's judgment in *Geddis v. The Bann Reservoir*, in the House of Lords (3 App. Cas. 430.) There the proprietors were held to be liable because the plaintiff's land had been overflowed and damaged by a flood caused by the omission of the proprietors to dredge the silt out of a water-course, which it was held they were under a statutory duty to keep in proper order. And Lord Blackburn repeats no action will lie for the doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one, but an action does lie for doing that which the legislature has authorised, if it be done negligently.

But it must be negligence in doing the work itself, as very clearly shewn in that case; the question was whether the powers given by the Act of Parliament to the company for the convenience and due regulation of the supply of the water to be kept in the reservoirs and conveyed out of them into the river Bann, and the powers "to make, erect,

alter, maintain, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels, water-courses, &c., extended to cleaning and deepening the natural channel of the water-course called the Muddock, into which they had poured their water, and which they had used as the means of conveying the water from the reservoir to the Bann. If they had no power to interfere with the channel, it was looked upon as too clear for argument that no action would lie; if they had the power, it was negligence in them not to exercise it and prevent the water overflowing to the plaintiff's injury.

That was an action against persons who had this privilege for their own profit, and not as in the present case, against a municipal corporation; but the plaintiff would have been without remedy if the proper construction of the act had been to allow them to empty the water into the Muddock with no power to scour the river.

In the present case, the corporation are by statute bound to repair a road already in existence, but have no power without a special authority from the council by by-law to make sewers or connections with the under drains; and it may be, had no funds applicable to such a purpose.

The plaintiff gave all the evidence that he proposed to offer, but that evidence discloses no cause of action.

Because, even assuming without evidence to that effect that a greater quantity of water found its way to the plaintiff's lot than when the whole place was in a state of nature, the act which indirectly partially caused that increase, was one which the city was authorized and bound to do, and was done properly and without negligence; and that the making of sewers and connecting the gutters therewith, was a matter purely discretionary with the council, and the corporation had no power to do either until authorized to do so by an enactment or by-law of the council; and because the mode of carrying out the undertaking was a matter entirely within the discretion of the council, and cannot be reviewed by a jury in

the absence of evidence of negligence in the carrying out of the work so decided on by the council or its agents.

I am of opinion, therefore, that the nonsuit was right, and that the appeal should consequently be allowed, and judgment entered for defendant with costs.

Since writing the foregoing, I have seen a case which, if good law, strongly confirms me in the views I have above expressed. I refer to the case of *Dixon v. The Metropolitan Board of Works*, 7 Q. B. D. 418.

*Appeal dismissed with costs.*

[BURTON, J.A., dissenting.]



## SMITH V. CHISHOME.

*Power of appointment—Will—Power, execution or delegation of—Vendor and purchaser.*

By a marriage settlement lands were conveyed to the use of the settlor, the mother of the intended husband, for life, and after her death in trust to pay the rents to the intended wife and, in case of her death before her husband, upon certain trusts in favor of the husband and the children of the marriage; but if he should die in her lifetime then in trust for such persons as he by any deed with power of revocation and new appointment, or by his will should direct and appoint, and in default of appointment in trust for his right heirs.

Before the 1st of January, 1874, the husband pre-deceased his wife leaving no children. By his will he devised as follows:

*"I give unto my wife all my real and personal estate whatever and wheresoever to hold unto her and her heirs &c., absolutely forever. I do also transfer unto her all the powers vested in me to bequeath, convey, or execute by will or otherwise all or any of the properties conveyed to her under the settlement by Bathsheba Smith."*

The settlor was then dead. The wife, assuming to execute the power contained in the settlement, by deed not containing a power of revocation appointed the lands to her own use absolutely and then contracted to sell a part of them in fee.

Upon a case stated for the opinion of the Court, under the Vendor and Purchaser Act as to whether a good title could be made to the purchaser it was held by the Chancellor:

- (1) That the power was not executed by the will.
- (2) That there was a valid delegation of the power to the wife by the will.
- (3) That the deed executed by her was not a valid execution of the power because not made with power of revocation and new appointment; and that the purchaser could not be compelled to accept the title because of the revocable character of any valid appointment by deed.

On appeal to this Court, *Held*, that the donee could not by his will delegate the execution of the power to his wife, and therefore that she could not, under any circumstances, make a valid appointment thereunder.

Judgment of the Chancellor (11 O. R. 191) affirmed on this ground.

THIS was an appeal from the judgment of Boyd, C., by the plaintiff.

The case is reported below in 11 O. R. 191, *sub nom. Smith v. McLellan*.

The facts sufficiently appear in the headnote and in the report of the case in the Court below. The appeal came on to be heard before this Court on the 30th of January, 1888.\*

Moss, Q.C., for the appellant.

E. Martin, Q.C., for the respondent.

\*Present—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

March 6, 1888. BURTON, J. A.—Under the marriage settlement executed by Bathsheba Smith, on the marriage of her son William Kennedy Smith, to Martha Minerva MacDonnell, certain lands were conveyed to the trustees of the settlement to the use of the settlor, for life, and after her death in trust to pay the rents into the hands of the intended wife for her sole, separate and particular use and benefit free from the control of her husband and without power of anticipation; and in case of death in the lifetime of her husband then in trust to permit him to receive the rents for his life, and after the death of the survivor in trust for the children of the marriage, and if no child in trust for the husband and his heirs absolutely after the death of his wife if he should survive her, but if he should die in her life time then for such persons as he by any deed with power of revocation, and new appointment or by his will should direct and appoint; and in default in trust for his right heirs.

William Kennedy Smith, died after the marriage, and in the life-time of the wife, having made his will the only portions of which, which are material to this inquiry were these :

“I do hereby give unto my dear wife all my real and personal estate whatever and wheresoever to hold unto her, her heirs &c. &c.. absolutely for ever.

I do also transfer unto her all the powers vested in me to bequeath, convey, execute by will or otherwise, all or any of the properties conveyed to her under the settlement by Bathsheba Smith.”

Bathsheba Smith was then dead.

The wife, under the power contained in the settlement, appointed the lands to her own use absolutely.

The husband had some other lands of no great value.

The points referred for the opinion of the Court were :

1. Whether the will was a valid execution of the power, or was a valid delegation of it under the settlement to the wife.

2. Whether she had an indefeasible title in fee simple in the lands.

3. Whether the defendants should be compelled to carry out their purchase.

The learned Chancellor who heard the case held :—

1. That the will was not an execution of the power, but was a valid delegation of it to his wife.

2. That the appointment in favour of herself could only be properly made in pursuance of the power, and that was by deed with power of revocation.

3. That she would thus have vested in her the fee simple subject to the power of revocation, and that in consequence of its revocable character the purchaser could not be compelled to accept the title.

The wife, after the delivery of the judgment, exercised the power of appointment by deed *with a power of revocation* in favor of herself, and desired the opinion of the Court as to whether under the new deed she could make a good title.

In the view we take of the case it is not necessary to consider the new point.

We all agree with the learned Chancellor that whatever might have been the effect of the first clause of the will had it stood alone, when read in connection with the second clause, it cannot be regarded as an exercise of the power, but, whether a power of this kind could or could not be properly delegated during his life, it is clear that not having been exercised during the lifetime of Mr. Smith, it died with him, and that there was therefore nothing to delegate.

Upon this short ground, therefore, I am of opinion that the appeal must be dismissed, and each of the questions answered in the negative.

OSLER, J. A.—We agree with the learned Chancellor that the title is one which the Court will not force upon the purchasers; I refer on this point to the case of *Alexander v. Mills*, L. R. 6 Ch. 124. 131.

The two clauses of the will of W. K. Smith are so strongly contrasted, that the first cannot be treated as an

execution of the power, a construction which, if it stood alone, it might be capable of. See *Re Mills*, *Mills v. Mills*, 34 Ch. D. 186. The second clause shews that the testator distinguished between his own "real and personal estate," and that over which he had merely a disposing power, of however high a nature, and that his intention was, not only to abstain from executing such power, but to transfer it to his wife to execute by deed or will as he might himself have done. Then the question is, whether he could thus by will transfer or delegate it? It appears to me that he could not. How could his right heirs, who by the terms of the settlement were to take subject to the power, and whose rights under the settlement if they were to arise at all, (the power not having been executed by the donee by deed in his lifetime), must have been ascertained at the moment of his death, be displaced except by an actual exercise of the power? He had an election to execute in one of two ways, viz., either by deed signed, sealed, and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament :

"'Tis true he had a power of disposing, but this was to be executed at his election and by such circumstances as were individually privy to himself. For it was to be done by his will, according to one proviso, and by the other by writing under his hand and seal. By his will he might have limited new uses but he made none, and 'tis personal, no other man can make his will," *Smith v. Wheeler*, 1 Vent. 128.

So in this case the donee has appointed by neither of these modes, that is to say, although he had, as had the donee in *Smith v. Wheeler*, the entire beneficial interest in the property subject to the power and his wife's life estate, he has not disposed of it ; and therefore, to quote again from Ventris :

"All stands as it is, and nothing is made void, and then all is immediately vested in the son [or, as in this case, the right heirs] by force of the first conveyance."



He has merely attempted to transfer his power to his wife. That he could in his lifetime have executed an appointment by power of attorney, just as he could have conveyed the fee simple, need not be questioned. That would still have been *his* appointment. But if he could thus by his will delegate the execution of the power to his wife, I see not why she or any *delegatus* of hers might not do so, and so *ad infinitum*. If an appointment by her could take effect it would do so as an appointment by her under the settlement, not as a limitation under an appointment to her by the donee of the power to such uses as she should appoint. Such an execution of the power by him would have been effectual, for the power being a general one conferring on him the entire beneficial interest in the property subject to his wife's life estate, he might have disposed of it as he pleased, and subject to such restrictions and conditions as he thought proper. The difficulty is, that he has *not* disposed of it.

In *White v. Wilson* 1 Drew. 304, referred to in the Court below, Kindersley V. C. said :

"It is clear that when a person has an absolute power of appointment he may appoint to certain persons or classes of persons in such shares as another person shall nominate."

But this implies an actual execution of the power by the donee.

Here he has not executed it at all.

On this ground, therefore, viz., that the donee has not, by deed or will, executed the power, and that he could not, by his will, delegate the execution of it, I think the judgment should be affirmed.

I refer to *Ewart v. Ewart*, 11 Hare 276, *Worrell v. Jacob*, 3 Mer. 256 ; Sugden on Powers, 180 ; Farwell on Powers 356 ; *Ingram v. Ingram*, 2 Atk. 88 ; *Hamilton v. Royse*, 2 Sch. & Lef. 330 ; *Boyes v. Cook*, 14 Ch. D. 53, 56 ; *Williamson v. Farwell*, 35 Ch. D. 128 ; *Russell v. Plaice*, 18 Beav. 21. *Vane v. Rigden*, L. R. 5 Ch. 666 p. 669.

*Ingram v. Ingram*, 2 Atk. 88, was not a case of absolute ownership, the power was to appoint to certain per-

sons. *Osborne v. Rowlett*, 14 Ch. D. 774 was a case of a trust for sale not a power, and it was held that devisees of the surviving trustee (assigns not being named) could execute it; see also the observations of the Master of the Rolls pp. 790-791 in *Wilson v. Bennett* 5 DeG. S., 475.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.\*

*Appeal dismissed with costs*

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\*PATTERSON, J. A., delivered a written judgment which has been mislaid, and therefore cannot be printed.

## JORDAN V. DUNN.

*Will—Condition to abstain from intoxicating liquors and card playing—  
Validity of condition.*

A testator devised to his wife for life the south half of lot 6, and then as follows: "I give and devise to my son Michael, after the death of his mother, the use of the said south half lot 6, subject to the following conditions: (1) That he totally abstain from intoxicating liquors and card playing. \* \* Ten years after the death of his mother, should he fulfil these above mentioned conditions, I give and devise to him to hold to his heirs and assigns forever the said lot. Should my said son Michael not fill to the letter these conditions then he shall have no right or title to the use of the said property during or after his mother's lifetime; but I will and bequeath the said half lot 6 to my grandson James Dunn, to hold to his heirs and assigns forever."

Michael died in 1886, five years after the testator's widow. He had not been a total abstainer at any time after his father's death which took place in 1872. On the contrary, it was shown he had been an habitual drinker.

*Held*, affirming the judgment of the Queen's Bench Division (13 O. R. 267) that the condition was valid in law; that it had been broken, and that in consequence the devise in favor of the testator's grandson took effect. Such a condition could not fairly be interpreted to preclude the use of intoxicants for *bonâ fide* medicinal purposes.

THIS was an appeal by the defendant from the judgment of a Divisional Court of the Queen's Bench Division reported 13 O. R. 267, reversing the judgment of O'Connor, J., at the trial.

The facts are sufficiently stated in the head note and the judgment.

The appeal came on for hearing on the 8th and 9th of February, 1888\*

*Moss*, Q.C., and *Dancey*, for the appellant.

*Lash*, Q.C., and *Harding*, for the respondent.

March 6, 1888. The judgment of the Court was delivered by PATTERSON, J. A.—This appeal does not seem to present any serious difficulty.

The land in question is the south half of lot six. It is spoken of in three places in the will:—

*Present*: HAGARTY, C.J.O., BURTON, PATTERSON, AND OSLER, JJ.A.

"I give and devise to my wife Ann Dunn, all my household goods and furniture for the term of her natural life. I give and devise for her use the dwelling-house wherein I now dwell, situated on south half of lot six, west of Oxford road, Gore of Downie, county of Perth, Ontario, Canada, also the use of said lot. \* \* I give and devise to my third son Michael Dunn, after the death of his mother, the use of the south half of lot six, west of Oxford road, Gore of Downie, county of Perth, subject to the following conditions which I strictly desire to be observed and enforced : First, that he abstain totally from intoxicating liquors and card-playing. Secondly, that he be kind and obedient to his mother. Thirdly, that he be known among his friends as an industrious man. Ten years after the death of his mother, should he fulfil these above mentioned conditions, I give and devise to him to hold to his heirs and assigns forever the said lot, being south half of lot six, west of Oxford road, Gore of Downie, Perth, Ontario, Canada. Should my said son Michael not fill to the letter these conditions, then he shall have no right or title to the use of said property during or after his mother's lifetime, but I will and bequeath said half lot six to my grandson James Dunn to hold to his heirs and assigns forever."

The will bears date the 22nd of April, 1870.

The testator died on the 4th of January, 1872, and the grandson James Dunn died an infant, about three months after the testator. He was a son of the defendant James Dunn, who is his heir-at-law.

The testator's widow died in May, 1881. She had continued to live in the dwelling-house on the lot, and died there. Michael lived there, also, for four years after his father's death, when he removed to Seaforth, where he lived until his death which took place on the tenth of June, 1886.

The plaintiffs are the executors of Michael, and his devisees of the land.

They commenced this action on the 1st of September, 1886, to establish their title to the land.

The defendants assert that the devise over to the grandson took effect by reason of Michael's failure to comply with the conditions on which he was to have the land, particularly the first condition, which required him to abstain totally from intoxicating liquors and card playing.

The late Mr. Justice O'Connor, who tried the action, decided in favour of the plaintiffs, and his decision was



reversed by the judgment of the Divisional Court from which the plaintiffs now appeal.

The controversy turns to a considerable extent on the meaning of the first condition. What did the testator mean by requiring Michael to abstain totally from intoxicating liquors? He used a common vernacular expression, and evidently meant that his son was to be a total abstainer in the well understood import of that term. That does not and cannot fairly be interpreted to preclude the use of alcoholic stimulants for *bonâ fide* medicinal purposes, any more than an injunction against the opium habit would forbid the proper use of Dover's powder or paregoric.

It happens that the popular use of the word "abstain," with reference to drinking habits, is also the recognized etymological meaning of the word.

It is thus defined in Webster's dictionary :

"In a *general sense*, to forbear, or refrain from, voluntarily; but used chiefly to denote a restraint upon the passions or appetite; to refrain from indulgence; as to *abstain* from the use of ardent spirits; to *abstain* from luxuries. 'Abstain from meats offered to idols.' Acts xv."

There is nothing unreasonable in the condition as so understood, and much less is there sufficient ground for holding, as was held at the trial, that the condition is void.

[The learned Judge then proceeded to consider the evidence, pointing out that it was shewn clearly that Michael Dunn had not, from the time of his father's death, been a total abstainer, but the contrary, and had been in the habit of drinking otherwise than for medicinal purposes, and continued.]

This understanding of the condition leaves nothing to turn on the question which was debated before us as well as in the Courts below, as to whether it is a condition precedent or a condition subsequent, or partly one and partly the other.

It is clear that, until ten years after his mother's death, Michael was not to have the estate free from the condition, and that on breach of the condition the estate was to go over.

It was argued before us that James Dunn had recognized Michael's right to the possession of the land after the death of their mother, and must be taken to have admitted the performance of the conditions or to have condoned the failure to perform them.

This point does not appear to have been taken below, and it cannot be rested on any finding of fact.

The evidence of Mrs. Dunn seems to have been given with a view to some such contention. Her story was that the defendant James Dunn lived with his mother on the place at the time of her death, and continued to live there for a year longer, when he let the place to his brother-in-law Patrick Carney, and went himself to live on property which he had in Stratford. This letting to Carney, she said, was by consent of Michael who owed money to James, and in order that James might pay himself out of the rent; and she further said, that Carney continued tenant of James until a year before the trial, when he took a lease from Michael. But she did not profess to give any of these facts from her own knowledge. Carney was a witness at the trial, and was not asked a word on the subject, and James Dunn, the defendant, was not present at the trial.

That being the state of the evidence, it is no surprise that we find nothing said about it in any judgment pronounced in the Courts below.

But nothing could be made of the point. Between landlord and tenant a lease may be voidable for breach of a covenant or condition, and the election of the landlord to treat the lease as subsisting, after knowledge of the breach, may preclude him from afterwards asserting a forfeiture. But no authority has been produced for applying a rule of that kind to the vesting or divesting of an estate in fee.

I have no doubt that the judgment of the Divisional Court is correct, and that we should dismiss the appeal with costs.

*Appeal dismissed with costs.*

## SUPERIOR LOAN AND SAVINGS COMPANY V. LUCAS.

*Mortgage—Rectification or rescission—Form of decree where mortgage rescinded after money advanced.*

THIS case is reported in 44 U. C. R. 106. It was an action of ejectment by mortgagees against mortgagor, which was defended by the latter on equitable grounds, namely, that by mistake, and contrary to the true agreement of the parties; the quarterly repayments mentioned in the proviso were larger than they should have been, and that the redemise clause was omitted. Judgment was given at the trial by PATTERSON, J. A., in favor of the defendant rectifying the agreement in accordance with his contention which was afterwards affirmed by the full Court, HAGARTY, C. J., dissenting.

An appeal from that judgment was heard on the 12th of September, 1879.\*

At the conclusion of the argument judgment was delivered by MOSS, C. J. O., allowing the appeal on the grounds mentioned in the judgment of HAGARTY, C. J., in the Court below, viz., that the defendant was entitled to a decree for rescission only, and that a decree for rectification of the mortgage was improper, the parties never having been *ad idem*. The following is a note of order directed to be drawn up.

*Per Cur.*—An account to be taken by the registrar of the sum advanced with interest thereon at six per cent. to be paid in six months; on payment property to be reconveyed. In default of payment verdict to be entered for the plaintiff; no costs of appeal or of Court below to either party.

*W. W. Fitzgerald, and Meek, for the appellants.*  
*Magee, for the respondent.*

\**Present.*—MOSS, C.J.O., BURTON, MORRISON, J.J.A., and OSLER, J.

IN RE RAINY LAKE LUMBER COMPANY—STEWART,  
LIQUIDATOR V. UNION BANK OF LOWER CANADA.

*Banks and banking—R. S. C. ch. 120, secs. 45, 48—Sale by bank of chattels mortgaged as security for debt—Chattel mortgage, right of liquidator under the winding-up Act to object to formal defects in or want of registration of.*

THIS appeal by the liquidator from the judgment of O'CONNOR, J., was heard on the 2nd and 3rd of February 1888.\*

The COURT delivered judgment at the conclusion of the argument affirming the judgment of O'CONNOR, J., in favor of the Union Bank, on the following grounds :

1. The bank had the right to take the chattel mortgage in question. Secs. 45-48 of the Banking Act do not prohibit a bank from taking security upon real, or as in this case upon personal property, and making such arrangements for its sale and disposition as they may think proper. What is forbidden is, the investing the money of the bank in trading. The transaction in question in this case was not a buying and selling of goods by investing the bank money therein, but was merely taking security for a debt already incurred, and the carrying out of an arrangement for the sale and realization of the property mortgaged for payment of the debt.

2. There was a sufficient delivery and actual and continued change of possession of the property within the Bills of Sale and Chattel Mortgage Act, and therefore the mortgage was not avoided by the omission to register it.

Whether the liquidator of a company under the Winding-Up Act of Canada, R. S. C. ch. 129, can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do : *Quære*.

*J. R. Roaf*, for the appellant.

*Worrell*, for the petitioning creditors, and *Thomson and Geo. Bell*, for the Union Bank, respondents.

*Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.



## BROWN v. HOWLAND.

*Promissory note—Incomplete instrument.*

THIS was an appeal from the judgment of a Divisional Court of the Common Pleas Division, reported 9 O. R. 48. The appeal was heard on 12th January, 1887.\*

At the conclusion of the argument the COURT dismissed the appeal with costs, holding that the instrument sued on had never been perfected or delivered as a promissory note, and that the defendant was therefore not liable thereon.

*Maclaren*, for the plaintiff (appellant).

*Arnoldi*, for the respondent (defendant).

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\**Present*—HAGARTY, C. J. O., BURTON, and PATTERSON, JJ.A., and FERGUSON, J.

# PETERBOROUGH REAL ESTATE COMPANY V. PATTERSON.

*Will, construction of—Wild's case 6 Rep. 17—Restraint on alienation.*

By her will the testatrix devised as follows, “*I give and devise to my beloved children A. P. [her son] and M. P. [his wife] and to their children and children's children forever all and singular lot 15 \* \* \* Provided always that the aforesaid A. P. or M. P. shall not be at liberty at any time or for any purpose to convey or dispose of [said lot] as it is my will that the same be entailed for the benefit of their children.*”

The residue of her estate the testatrix devised to her daughter-in-law the said M. P.

*Held*, that upon the true construction of the will A. P. and M. P. took only an estate by entireties for their lives and the life of the survivor of them.

*Held*, also that they did not take an ultimate remainder in fee, expectant on any estate tail given to the children, and that under 48 Vict. ch. 13 sec. 5 (R. S. O. 1887, ch. 44 sec. 52, sub-sec. 5) it was the duty of the Court to make a declaratory decree as to this in order to answer as to the whole estate taken by the parents.

*Held*, also, that a mortgage by A. P. and M. P. was valid and bound their life estate in the land notwithstanding the attempted restraint on alienation.

*Semble*, that the children took an estate tail but the special case which was stated for the opinion of the Court did not require this to be declared.

The judgment of the Q. B. D. affirmed with a variation.

THIS was an appeal by the plaintiffs from a Divisional Court of the Queen's Bench Division upon a special case stated for the opinion of the Court. The judgment below is reported in 13 O. R. 142 where and in the present head-note the facts are fully stated.

The appeal came on for hearing on the 29th November, 1887\*

*Robinson*, Q.C., for the appellants.

*J. K. Kerr*, Q.C., for the infant respondents.

*Edmonson*, for the respondents Patterson and wife.

*Clute*, for respondent Mrs. Jordan.

*McCarthy*, Q.C., for the other respondents.

March 6, 1888. HAGARTY, C. J. O.—I am very strongly of the opinion that the construction placed upon this will by Wilson, C. J., in his very full and careful judgment best

\**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

accords with the intentions of the testatrix, as evidenced by the not very clear legal terms in which her views are expressed.

It may be conceded to the appellants that the devise to the daughter and husband "and to their children and children's children for ever," standing alone, would confer an estate tail on the husband and daughter. But we cannot overlook the residue of the will. The restraint on alienation may be conceded to be void as against an estate tail legally devised, but where the devise, as here, is not in legal form, the restraint, as well as other parts of the will, may be looked to to ascertain the intention as to the nature of the interest devised. The reason given for the restraint is, "as it is my will that the same be entailed for the benefit of their children."

The immediate named devisees are, as such, to enjoy the estate, but as the learned Chief Justice puts it, "I mean that they, the children, shall take such an estate in the land that Alexander and Mary Patterson, nor either of them, be at liberty at any time, or for any purpose to convey or dispose of the land to the prejudice of their children; and the way I take to do that is, 'it is my will that the land be entailed on the children of Alexander and Mary Patterson, so that the children shall not take through their parents, but independently of them,' apart from all authorities or settled rules of construction, I think that this is the truest translation (as it were) of the meaning of the testatrix's language."

If we, as Lord Hatherley says in *Clifford v. Koe*, 5 App. Cas. at p. 462, "do what is sometimes quaintly called, placing ourselves in the testator's arm chair," I think we can have little doubt of her intention being to give a life interest to her daughter and husband, and to create what she understood to be an entail in favor of their children's children. Her first idea of entailing was for the children.

It is clear that her probable ignorance of the ease with which the law allows the objects of the entail to be defeated cannot be taken into consideration in construing the words used.

I think the judgment below is right, and the appeal should be dismissed.

Fully satisfied, as I think we must be, of the intentions of the testatrix, I think the words used are sufficiently flexible not to defeat the objects of the will.

The whole subject is discussed in the 38th chapter of Jarman. See also the notes to *Wild's Case*, 6 Rep. 17, and Tudor's Leading Cases on Real Property, 3rd ed., 672.

PATTERSON, J. A.—In *Wild's Case*, 6 Rep. 17, three things were resolved, (1) "If A devises his lands to B and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail." Then follows the reasons which, as Lord Selborne remarked in *Clifford v. Koe*, 5 App. Cas. 447, 452, have some times been criticised, notwithstanding which the rule has been uniformly followed in cases falling properly within its scope.

The present is not such a case, because there were children of Alexander and Mary Patterson at the date of the will, and also at the death of the testatrix, whichever period should be taken, under the present state of the law concerning wills, as "the time of the devise."

(2) "But if a man devises land to A and to his children or issue, and they then have issue of their bodies, [the plural *they* and *theirs* being apparently used by mistake, as noted in Jarman on Wills, 3rd ed., Vol. ii., p. 369, *note p.*] there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life."

We must see how far the case comes within this resolution, and whether a suggestion made by Mr. McCarthy that the parents and such of the children as were in esse at the time of the devise took a joint estate, the after-born children taking nothing, is maintainable, or whether we may not find in the third resolution a rule better fitted to the circumstances.

(3) "But it was resolved that if a man, as in the case at bar, devises land to a husband and wife, and after their



decease to their children, or the remainder to their children, although they have not any child at the time, yet every child which they shall have after, may take by way of remainder, according to the rule of the law; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife."

In the will before us, I think the intent appears very plainly that the children are not to take immediately but after the decease of Alexander Patterson and his wife.

"The aforesaid Alexander Patterson or Mary Patterson shall not be at liberty at any time, or for any purpose to convey or dispose of" the land; "as it is my will that the same be entailed for the benefit of their children."

It would be difficult, short of giving a life estate in express words, to select language more expressive of the intention to confine the interest of Alexander and Mary Patterson in the land to the term of their lives.

There is, of course, no doubt that, if by the direct devise an estate tail had been created in Alexander and Mary, the restriction of the power to alienate would have been inoperative against the law which enables a tenant in tail to convey in fee. But that consideration does not arise until it is certain that there is a devise in tail.

The rule in *Wild's Case* does not, as I have shewn, give that effect to the words of this devise "to Alexander Patterson and to Mary Patterson, and to their children and children's children forever," because there were children at the time of the devise. Under the resolutions in that case, applied to the facts, this word "children" is a term of purchase, and not of limitation, and the other term "children's children," is a term of limitation and not of purchase, giving to the children of the first generation an estate tail in remainder expectant on the termination of the life estate, which is given to the parents.

It is not unworthy of notice that when the testatrix mentions her will that the land shall be "entailed" for the benefit of her grand-children, she uses the technical expression with a good deal of accuracy. Her words are "entailed for the benefit of their children." She does not

repeat the words of limitation, "children's children," but explains in an intelligible way that her meaning in giving the land to her daughter and her husband and to their children and children's children, was that the parents should not have power so to dispose of the land as to prevent its reaching the children, in other words, that they should have life estates only, and that it should come to the possession of the children as tenants in tail.

As to the tendency in modern cases to hold upon very slight indication of intention that the parent shall take a life interest with remainder to the children, see remarks of Sir J. Romilly, M. R., in *Salmon v. Tidmarsh*, 5 Jur. N. S. 1380, where he refers to *Crockett v. Crockett*, 2 Phil. 553 ; and see 2 Jarman on Wills, 375, 376, 3rd. ed.

The extent to which the rule in *Wild's Case* is recognized as obligatory on the Courts, is well shewn in the case of the *Earl of Tyrone v. The Marquis of Waterford*, before the Lord Chancellor, Lord Campbell, and the Lords Justices, 1 D. F. & J. 613 ; 6 Jur. N. S. 657, and the two cases in the House of Lords, *Byng v. Byng*, 10 H. L. Cas. 171 ; 8 Jur. N. S. 1135 ; and *Clifford v. Koe*, 5 App. Cas. 477 ; and these cases shew at the same time that that rule must be applied in view of the universal rule that the intention of a testator must be collected from the whole of the will. This is forcibly pointed out by Lord Westbury, in *Byng v. Byng*.

It does not strike me that in this case any difficulty exists in applying to the language of the will in connection with the position of the Patterson family at the time of the devise, the rule as stated in the third resolution.

I would therefore answer the questions proposed in the special case, as follows :

To the first question :

Upon the death of Elizabeth Hartley, the defendants, Alexander Patterson and Mary Patterson, under the last will and testament of the said Elizabeth Hartley did not become possessed of an estate tail in the lands in question.

To the second question :

The said last will and testament does not contain such a restraint upon alienation as to render a mortgage executed by the said Mary Patterson and Alexander Patterson void, as a mortgage of their life estate in the land.

The third question is disposed of by the negative answer to the first.

In these answers, I agree with the conclusions of the Court below ; but, in the judgment there given, several details are gone into outside of the questions, as formulated in the special case.

No objection has been made to the judgment on that account, and it is manifest that to follow the case literally would have the effect of doing injustice to the plaintiffs, because it is there agreed that the lands shall be freed from the mortgage if the Court shall answer in the negative either the first or third question. The case thus throws the rights of the plaintiffs altogether on the affirmance of the two points—viz., (under the first question) that the mortgagors took an estate tail under the will, and (under the third question) that by the mortgage they conveyed the fee simple ; and, further, the only consent to judgment of foreclosure, or any judgment but a personal order for the debt, is in the event, the reverse of which has happened, of the first and third questions being answered in the affirmative, and the second in the negative.

I assume, therefore, from the absence of objection to the form of the judgment, that the case as stated is modified by a consent to such judgment as the Court shall decide to be proper (*a*).

The judgment, as formally drawn up, seems inadvertently to omit the personal order to pay the debt. Besides supplying this omission, there are some matters of detail in which the judgment should, I think, be varied.

(1.) This Court doth declare as follows :

(*a*) That upon the death of Elizabeth Hartley, the defendants, Mary Patterson and Alexander Patterson, under the last will and testament of the said Elizabeth Hartley,

(*a*) See the consent as stated on p. 145, 13 O. R.

did not become seized or possessed of an estate tail in the land in question, nor of any other than an estate by entireties for their joint lives and the life of the survivor of them.

In order to confine the first paragraph to the declaration that Alexander and Mary Patterson, did not take an estate tail or any estate, but a life estate, I would strike out the words "in possession other;" and as we are not required to declare what estate the children take, I would strike out all of the paragraph after the words "survivor of them."

I would also strike out of the third paragraph the words "or greater or immediate," and the words "in possession." And I would strike out all of the paragraph from and including the words, "but this declaration."

I shall explain my reason for this. The learned Chief Justice, in the Court below, inclined to the opinion that Alexander and Mary Patterson took an ultimate remainder in fee simple expectant on the estate tail given to the children. He thought that estate in remainder might be exigible for the payment of creditors, but he considered that he was precluded by the practice of the Court from making any declaration respecting it. I do not understand him to have been influenced by the apparently small value of such an estate, although he speaks more than once in his judgment of the value being trifling by reason of the facility with which the entail might be barred by the children; and I take it that the value, in such a case, is something that one cannot venture even to guess at. Who can tell that, by reason of disease or casualty, all the tenants in tail may not die infants and unmarried? I understand his lordship's opinion to have been that a declaration respecting a future estate was not properly within the province of the Court. The case cited as authority for that proposition is, *Hampton v. Holman*, 5 Ch. D. 183, where Jessel, M. R., after stating two questions of title which he held were ripe for decision, said: "The third question suggested is, whether, admitting that the petitioner takes an express estate for life, and that her children, if she has any, take estates for life after her



death, she is not entitled to an estate tail in remainder expectant on those life estates, and to a declaration accordingly. That, according to the practice of this Court, is not a question which can be decided now.

It was always the settled law of the old Court of Chancery, and is now, therefore, the settled law of the Chancery Division of the High Court of Justice, that it is not the province of the Court to declare the rights of parties except in cases where immediate relief can be given," with further observations on the same topic.

His Lordship, the Chief Justice, must, as I venture to think, have overlooked for the moment that he was dealing with an action by a mortgagee who asked relief by the enforcement of his charge upon whatever estate the mortgage covered; and that, therefore, under the old practice of Chancery, the declaration in question might well have been made; but his attention was not called to the enactment of 48 Vict. ch. 13, sec. 5, (O.), that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

If, therefore, we follow the course adopted, I think correctly, in the Court below, to declare what title was taken by the mortgagors, and not to content ourselves by saying, in literal answer to the question stated, that they did not take an estate tail, it must be our duty to include in our answer the whole estate taken by them.

But I have not been able to see on what ground the devise can be held to carry such a reversionary interest, or to give them more than the life estate.

For these reasons, I would strike out from the judgment the passages I have mentioned, and with those variations, I would affirm the judgment and dismiss the appeal with costs.

OSLER, J. A.—I think that, although there were children of Alexander and Mary Patterson in existence at the date of the will, the terms in which the limitation in the first

clause is framed, would, even if that clause stood alone, preclude the application of the rule in *Wild's Case*, 6 Rep. 17, so as to treat it as a gift to the parents and children as tenants in common. Taking the clause by itself, the presumption is against the children taking as purchasers. A devise "to my children Alexander Patterson and to Mary Patterson, and to their children and children's children forever," denotes rather an intention to define the line of succession than to confer an immediate estate in the grandchildren of the testatrix, and the words are therefore to be taken, if not controlled by other expressions in the will indicating a different intention, as words of limitation and not as words of purchase, and so would confer an estate tail on the parents. For this the cases of *Trash v. Wood*, 4 M. & C. 324; *Tyrone v. Waterford*, 6 Jur. N. S. 567; 1 D. F. & J. 613, are authority, and I may add *Snowball v. Proctor*, 2 Y. & C. Ch. Cas. 278, where the words of the gift were "among my wife and children and their children after them." In Theobald on Wills, p. 310, several cases are referred to, in which the word "children" has been held a word of limitation quite independently of the rule in *Wild's Case*, 6 Co. 17. Among others is that of *Broadhurst v. Morris*, 2 B. & Ad. 1, which is said, in Jarman on Wills, vol. iii., p. 182, Am. ed., to have overruled *Jeffrey v. Honeywood*, 4 Mad. 398, which the respondents relied upon in support of their contention that in this clause there were found two gifts, one to the parents without words of limitation superadded, and another to their children, the first being for life, and the other in tail.

*Backhouse v. Wells*, Fortescue 133, may be referred to.

We are, however, to construe the will in such a way as to give effect if possible to all the words used by the testatrix, and in so doing, to ascertain whether the intention, which by the first clause might be imputed to her, is to any extent controlled or displaced by the proviso and explanation which immediately follow it.

The will is expressed throughout in untechnical language, and we are thus free from one source of embarrass-

ment in dealing with apparently inconsistent provisions. Then what effect is to be given to the second clause? It is not an independent isolated clause, but is expressed as an explanation and qualification of the preceding one. The testatrix forbids Alexander and Mary Patterson to convey or dispose of the property, *as*, that is, *because* it is her will that the same shall be entailed for the benefit of their children. She thus manifests a particular intention to benefit the latter, the prohibition against alienation being in diminution of the gift to the parents in order that their children may succeed to the enjoyment of the property. Coupled as this restriction is, with the idea of the property being entailed for the benefit of, or as we may read it, upon, the latter, I think we give effect to the real intention of the testatrix by holding that the former take an estate for life, the alienation of which cannot defeat the intention to benefit the children, rather than an estate tail to which such a restriction would be repugnant. The remainder in tail is then limited to the children, and effect is thus given to all the words of the will, and to the general and particular intention of the testatrix.

See *Dickson v. Dickson*, 6 O. R. 278.

I cannot say that I am entirely free from doubt, as the restraint on alienation may have been imposed simply because the testatrix may have thought it would be sufficient to prevent the parents from cutting off the entail which she intended to confer upon them for the benefit of themselves and their children. If her intention was to devise to the children in tail, it may be said that she would scarcely have thought it necessary to prohibit alienation by the parents. On the whole, however, I see no sufficient reason for disturbing the judgment, and therefore concur in affirming it with the variations suggested by my brother Patterson.

BURTON, J.A., concurred.

*Judgment below varied, and appeal dismissed with costs.*

# A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

## COURT OF APPEAL FOR ONTARIO.

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### **ABANDONING EXCESS.**

*See* DIVISION COURTS.

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### **ACCIDENT, COMPENSATION FOR DEATH CAUSED BY.**

*See* NEGLIGENCE, 2.

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### **ACQUIESCENCE.**

*See* DURESS.

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### **ACTION FOR MONEY PAID.**

*See* DIVISION COURTS.

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### **ADDITIONAL CONDITIONS.**

*See* FIRE INSURANCE, 2.

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### **ADMINISTRATION.**

*See* NEGLIGENCE, 2.  
96—VOL. XV. A.R.

### **AGENT FILLING UP APPLICATION FOR INSURANCE.**

*See* FIRE INSURANCE, 2.

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### **AGREEMENT AS TO OPERATING STREET RAILWAYS.**

*See* STREET RAILWAYS.

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### **AGREEMENT TO BUY AND CARRY STOCK ON MARGIN.**

*See* BROKER.

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### **APPEAL.**

*See* CRIMINAL LAW.

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### **APPEAL FROM COURT OF REVISION TO COUNTY JUDGE.**

*See* ASSESSMENT AND TAXES, 3.



## ASCERTAINMENT OF AMOUNT BY SIGNATURE.

See DIVISION COURTS.

## ASSESSMENT AND TAXES.

1. The two years limited by section 156, R. S. O. 1887, ch. 180, for impeaching a tax sale run from the time of making the tax deed, not from that of the auction sale.

The word *sale* in that section can be properly understood only in the sense of *conveyance*.

*Hutchinson v. Collier* 27 C. P. 249; *Church v. Fenton*, 28 C. P. 204, approved of. The contrary view expressed in *Smith v. Midland*, 4 O. R. 498; *Lytle v. Broddy*, 10 O. R. 530; *Claxton v. Shibley*, 10 O. R. 295; and *Deverill v. Coe*, 11 O. R. 222, dissented from.

Unoccupied land divided into lots was assessed for the year 1879, and entered in the non-resident division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued, and without the name of the owner, it was entered with the name of the owner prefixed, and valued *en bloc*.

The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax roll, and transmitted to the county treasurer. The owner became also the occupant of the lands, before the delivery to the collector of the collector's roll of 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned

them to the county treasurer in a "list of non-resident taxes returned from the collector's roll," and they were so entered in the treasurer's books. In the treasurer's list of lands liable to be sold for arrears of taxes in 1882, sent to the township clerk, the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed, as occupied land, for the years 1880, 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to section 111, in the list of non-resident lands, which appeared by the assessment roll of 1882 to have become occupied.

The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation, and being ignorant of the sale or that the taxes were alleged to be in arrear:

*Held*, (1) that the taxes having been entered in the collector's roll, with the name of the person assessed, the payment to the collector was valid, and, consequently, that there were no taxes in arrear for which the land could lawfully be sold:

(2) The duties of the assessor and township clerk, under sections 109, 110 and 111, are imperative and not directory merely, and their performance is conditional to the validity of a tax sale.

[BURTON, J. A., dissenting on this point.]

*Per* PATTERSON, J. A., *semble* under the circumstances in evidence the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155.

The judgment of FERGUSON, J., affirmed. *Donovan v. Hogan*, 432.

2. Plaintiff was the owner of a group of small islands in Lake Rousseau in the township of Medora, containing in all less than fifty acres. The island in question was patented to one Pope by the description of Island D. Plaintiff purchased it from Pope and called it by the fancy name of Oak Island, and built a house and made other improvements thereon, residing there for some months in each year.

The assessor having been erroneously informed that Pope was the owner of an island in Lake Rousseau called D, put down Island D. in the non-resident division of the assessment roll with the name "Robert T. Pope." This was done to distinguish it from another Island D in the same lake and township. He did not know that this Island D was one of the group belonging to Hall, though he knew that Hall was putting improvements on one of the islands which was in fact Island D or Oak Island. He supposed that the name of the improved island was Flora; and this was the name of one of Hall's Islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed, and actually assessed though under a wrong name. The taxes so assessed were actually paid. In 1883 the Island D was sold for arrears of taxes for the years 1879, 1880, 1881, and 1882. The purchase money was \$1, although the value with the improvements was about \$1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll.

*Held*, (affirming the judgment of the Chancery Division) that Island D being identified as that intended to be assessed, and being that on which the improvements had been made the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid the sale was void.

*Semble*, per HAGARTY, C. J. O., PATTERSON, and OSLER, JJ.A., that the sale would also be void as not having been under the circumstances openly and fairly conducted within the meaning of section 155.

The duty of the county treasurer in reference to tax sales observed upon: *Hall v. Hall*, 2 E. & A. 539; *Haisley v. Somers*, 13 O. R. 605, considered.

*Semble*, a sale for more taxes than are actually due cannot be supported under sec. 137, where sec. 155 does not apply in consequence of the sale not having been openly and fairly conducted.

*Yokham v. Hall*, 13 Gr. 235; *Edinburgh Life Ins. Co. v. Ferguson*, 32 U. C. R. 253, followed.

*Semble*, that Island D or Oak Island should have been assessed on the resident, instead of the non-resident division of the assessment roll.

*Per* PATTERSON, J. A.—Observations as to assessment of several parcels of non-resident land less than 200 acres for statute labor. *Hall v. Farquharson*, 456.

3. The plaintiffs, a Mutual Insurance Company, carrying on business in London (O.), were assessed for the gross amount of their receipts after payment of the year's losses and expenses, from which assessment they appealed successively to the Court of Revision and the County

Judge, both of whom sustained the action of the assessor, which was affirmed by Proudfoot, J., on the ground that the decision of the County Judge was final; and an appeal to this Court was on a like ground dismissed with costs.

Where the assessor has jurisdiction to assess the property, his assessment can only be reviewed in the mode provided by the act, viz., by appeal to the Court of Revision, and the County Judge. *London Mutual Insurance Company v. City of London*, 629.

4. The defendant company carried on their business at London, and were assessed there. They purchased the mortgages and other assets of the Brant Loan and Savings Company, a similar institution which carried on business in Brantford. After this the latter company ceased to do business, and the defendants left the mortgages and assets which had been transferred to them with an agent in Brantford for collection, but they had no branch office, and did not carry on business there. The plaintiffs assessed them for personal property in Brantford, from which the defendants did not appeal to the Court of Revision, and the plaintiffs brought an action to recover the amount of the assessment.

*Held*, that the defendants were assessable in London for the property which the plaintiffs had assumed to tax, and that as they had no branch office in Brantford, and were not carrying on business there, the plaintiffs' assessment of them was illegal and void: that there being no jurisdiction to assess them in Brantford, the defendants were not bound to appeal to the Court of Revision, and might question the assessment in the action.

*Nickle v. Douglas*, (in Appeal,) 37 U. C. R. 63, followed. Judgment of County Court reversed. *The Corporation of the City of Brantford v. The Ontario Investment Co.*, 605.

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## ASSIGNMENT BY WAY OF MORTGAGE.

See FIRE INSURANCE, 2, 3.

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## — FOR BENEFIT OF CREDITORS.

See FRAUDULENT PREFERENCE 1.

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## — OF BOOK DEBTS.

See FRAUDULENT PREFERENCE 2.

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## ATTACHMENT OF DEBTS.

The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under rule 370 O. J. A., relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in præsentī solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts.

Judgment of FERGUSON, J., reversed.

The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of *fi. fa.* against goods or lands. *Stuart v. Grough, et al.*, 299.



2. The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor to enforce the order to pay over pointed out.

*Wood v. Dunn*, L. R. 2 Q. B. 73, considered. *Stuart v. Grough et al.*, 299.

See EQUITABLE EXECUTION.

[But see now and compare Consol. Rule 935.]

## BANKRUPTCY AND INSOLVENCY.

See CONSTITUTIONAL LAW.

## BANKS AND BANKING.

The Court affirmed the judgment of O'Connor, J., in favour of the defendants the Union Bank, on the grounds (1) that the bank had the right to take the chattel mortgage. Secs. 45-8 of the Banking Act do not prohibit a bank from taking security upon real, or as in this case upon personal property. What is forbidden is, the investing of the money of the bank in trading; (2) there was a sufficient delivery and change of possession under the Bills of Sale and Chattel Mortgage Act, and therefore the mortgage was not avoided by the omission to register it, and

*Quære*—Whether the liquidator of a company under the Winding-up Act of Canada, R. S. O. ch. 129, can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *In re Rainy Lake Lumber Co.*—

*Stewart Liquidator v. Union Bank of London, Canada*, 749.

See also, NEGLIGENCE—BILLS OF EXCHANGE AND PROMISSORY NOTES.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

The Court, at the conclusion of the argument, dismissed an appeal from the judgment of the Common Pleas Division (9 O. R. 48), holding that the instrument sued had never been perfected or delivered as a promissory note, and that defendant was therefore not liable thereon. *Brown v. Howland*, 750.

See ESTOPPEL.

## BILLS OF SALE AND CHATTEL MORTGAGES.

1. A chattel mortgage to indemnify an indorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability.

The requirements of section 6 of the Chattel Mortgage Act, as to setting forth an agreement in the mortgage apply only to mortgages to secure future advances for the purposes therein mentioned.

In the case of a mortgage under that section as security against liabilities incurred by indorsing, or in any other way; all that is necessary is that the liability shall be one not extending for a longer period than



one year from the date of the mortgage, and shall be sufficiently described or identified therein.

The head note in *Barber v. McPherson*, 13 A. R. 356, corrected.

The reference in such a mortgage to a possible future renewal or extension of the liability which has not been agreed for and which the mortgagee is not bound to grant, does not invalidate the mortgage if in other respects sufficient. *Embury v. West*, 357.

2. By an ante nuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part and one M. of the third part, in consideration of the intended marriage certain lands and the goods in question consisting of horses, cows, and several articles of household furniture described as being in and upon and around the premises and appurtenances used and occupied by the said J. M. and being city etc., were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns.

The marriage took place on the 27th of March. Within five days from the execution of the assignment it was duly registered in the proper office as a bill of sale. The affidavit of *bona fides* was made by the plaintiff after the marriage, she being described therein as the bargainee.

The goods were afterwards seized by an execution creditor of the husband; the plaintiff claimed them and an interpleader issue was directed by the High Court to be tried in the County Court.

At the trial it was objected that the trustee should have been the

claimant and plaintiff in the issue, and on this ground judgment was given for the defendant.

*Held*, [reversing the judgment of the Court below] that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schræder v. Harnott*, 28 L. T. N. S 702 followed: (2) That the plaintiff was a person who, as bargainee, might properly make the affidavit of *bona fides*. (3) That the goods were sufficiently described and identified.

*Semble*, per HAGARTY, C.J.O., and OSLER, J.A., that a marriage contract or settlement in the form of the instrument in question, was not a sale of personal property within the Act and that registration therefore was not necessary.

*Per* PATTERSON, J.A. (1) That the transaction was within the statute and (2) that the legal title to the goods was in the plaintiff. *Connell v. Hickock*, 518.

*See also* BANKS AND BANKING—BILLS OF SALE AND CHATTEL MORTGAGE.

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## BOUNDARIES.

*See* WAY.

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## BRIDGES OVER RIVERS CROSSING BOUNDARY LINES.

*See* MUNICIPAL CORPORATIONS, 1.

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## BROKER.

Plaintiff employed F. as his broker to purchase shares in Federal Bank stock and to carry the same for him

until 1st December on margin, depositing with him a large sum of money for that purpose.

F. transferred his business to the defendants in July, and with it paid over to them the whole of the money which had been left in his hands by the plaintiff and they assumed F.'s contract with the latter. On the 10th of August they informed him of this by letter.

On the 12th October the defendants called upon plaintiff to put up \$2,000 additional margin, the stock having fallen in value, and on default they professed to sell and represented to him that they had sold his shares at a loss and charged him with the difference thereon—upwards of \$2,000.

It appeared that F. had never bought shares for the plaintiff; that he had not transferred, and that the defendants had never received any shares from him for the plaintiff. The alleged sale of these shares with the loss or difference on which the defendants had charged the plaintiff was a mere pretence, defendants never having had any shares of the plaintiff to sell, and the broker with whom they had made the arrangement to become the pretended purchaser having bought none from them.

*Held*, that the plaintiff was entitled to recover the money he had deposited with F., and which the defendants had received from him, as money had and received.

A contract by a broker to purchase stock for a customer is not satisfied by the broker holding himself liable to account for the market value of the stock when the customer calls upon him to do so or then purchasing stock to comply with the demand.

If any such custom existed among brokers, which there was no evi-

dence of, it would not be binding on the customer, unless he knew of it and specially submitted to its condition.

Judgment of the Court below affirmed. *Sutherland v. Cox*, 541.

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## BY-LAW.

*See* STREET RAILWAYS.

## BY-LAW TO ESTABLISH HIGHWAY.

*See* WAY.

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## CARRIERS.

The defendants, who were carriers by water of passengers and goods, made a special contract with the Commercial Travellers' Association for the season of 1885, by which members of the Association were entitled to receive tickets for passage at a reduced rate of fare upon certain conditions, one of which was expressed thus: "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties."

*Held*, upon the evidence, that the agreement had been continued for, and was binding during the period of 1886.

In July, 1886, the plaintiff D., a commercial traveller for a jeweller's firm, received a ticket upon the above condition for passage from Montreal to Toronto. He took on board with him three trunks, known as commercial Travellers' trunks, exceeding the allowed weight, containing jewellery, jeweller's tools, and other valuables, the whole comprising the usual outfit of a traveller for a jewellery house, and valued at about \$15,000.

The jury found that the trunks did not contain personal baggage but goods and merchandise, and that they were received by the defendants with knowledge of that fact.

The property was damaged by the negligence of the defendants, but they contended that they were relieved from all liability by the conditions of carriage.

*Held*, [OSLER, J.A., dissenting], (1) that the terms of the condition protected the defendants from all liability for negligence. The words "against all casualties" were merely intended to extend the meaning of the term "owner's risk" to all possible contingencies other than wilful misconduct on the part of the defendants.

(2) The goods, though in one sense merchandise, were to be treated as the personal baggage of a person in the position of the plaintiff travelling with samples in the course of his business.

*Per* OSLER, J.A. (1) The property was not personal baggage, such as a passenger was permitted to take with him without extra charge, but was commercial travellers' baggage or merchandise which the company would have been entitled to charge for, and for the loss of which, even in the absence of conditions, they would not have been liable, as *personal baggage*, either at common law, or under the Act respecting carriers by water. 37 Vict. ch. 25, sec. 2.

(2) That whatever might be the meaning to be attributed to "owner's risk" standing alone, the other part of the condition "against all casualties," qualified it by limiting the risk assumed by the owner to *accidents*, which would not include a loss caused by the negligence of the defendants.

*Lewis v. Great Western R. Co.*, 3

Q. B. D., 195; *Fitzgerald v. The Grand Trunk R. Co.*, 4 A. R. 601; *Wilson v. Xantho*, 12 App. Cas. 503, considered.

The judgment of the Q. B. D. and of the trial Judge reversed. *Dixon v. The Richelieu Navigation Company*, 647.

## CASES.

*Ackroyd in Re*, 1 Ex. 479 referred to.]—*See* DIVISION COURTS, 3.

*Ames v. Birkenhead Dock Co.*, 20 Beav. 332, acted on.]—*See* RECEIVER.

*Auger v. The Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165 considered.]—*See* RAILWAYS, 3.

*Barber v. McPherson*, 13 A. R. 356. Head note corrected.]—*See* BILLS OF SALE AND CHATTEL MORTGAGE, 1.

*Brant v. Waterloo*, 19 U. C. R. 450 approved.]—*See* MUNICIPAL CORPORATIONS.

*Campbell v. The Great Western R. W. Co.*, 15 U. C. R. 498, observed upon and distinguished.]—*See* RAILWAYS, 3.—NEGLIGENCE.

*Church v. Fenton*, 28 C. P. 204, approved of.]—*See* ASSESSMENT AND TAXES, 1.

*Clark v. Molyneux*, 3 Q. B. D. 235, referred to and followed.]—*See* DEFAMATION, 4.

*Claxton v. Shibley*, 10 O. R. 295, dissented from.]—*See* ASSESSMENT AND TAXES, 1.

*Collins v. Bristol and Exeter R. W. Co.* 7 H. L. Cas. 194 followed.] *See* RAILWAYS, 2.



*Deverill v. Coe*, 11 O. R. 222, dissented from.]—See ASSESSMENT AND TAXES, 1.

*Edinburgh Life Ins. Co. v. Ferguson*, 32 U. C. R. 253, followed.]—See ASSESSMENT AND TAXES, 2.

*Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4 approved.]—See WAY.

*Fitzgerald v. The Grand Trunk R. W. Co.*, 4 A. R. 601 considered.]—See CARRIERS.

*Forfar v. Climie*, 10 P. R. 90 approved.]—See DIVISION COURTS, 1.

*Glass v. Cameron*, 9 O. R. 712, considered and distinguished.]—See CREDITORS' RELIEF ACT.

*Grill v. The General Iron Screw Colliery Co.*, L. R. 1 C. P. 600, considered.]—See CARRIERS.

*Haisley v. Somers*, 13 O. R. 605, considered.]—See ASSESSMENT AND TAXES, 2.

*Hall v. Hall*, 2 E. & A. 539, considered.]—See ASSESSMENT AND TAXES, 1.

*Hawkins v. Gathercole*, 1 Drew 12, acted on.]—See ATTACHMENT OF DEBTS.

*Hutchison v. Collier*, 27 C. P. 249, approved of.]—See ASSESSMENT AND TAXES, 1.

*Ings v. Bank of Prince Edward*, 11 S. C. R. 265, followed.]—See FRAUDULENT PREFERENCE, 1.

*Kinsey v. Roche*, 8 P. R. 515, approved.]—See DIVISION COURTS, 1.

*Klein v. The Union Fire Ins. Co.*, 3 O. R. 234, approved and distinguished.]—See FIRE INSURANCE, 2.

97—VOL. XV. A.R.

*Laplante v. Peterborough*, 5 O. R. 634, approved.]—See MUNICIPAL CORPORATIONS, 4.

*Leeming v. Woon*, 7 A. R. 42, not to be followed.]—See ATTACHMENT OF DEBTS.

*Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195, considered.]—See CARRIERS.

*Lyttle v. Broddy*, 10 O. R. 530, dissented from.]—See ASSESSMENT AND TAXES, 1.

*MacDonald v. Boice*, 12 Gr. 48, considered and distinguished.]—See CREDITORS' RELIEF ACT.

*Midland R. W. Co. v. The Ontario Rolling Mills Co.*, 10 A. R. 677, followed.]—See CONTRACT, 1.

*Mitchell v. Vanlusen*, 14 A. R. 517, considered and followed.]—See DIVISION COURTS, 1.

*McIntee v. McCulloch*, 2 E. & A. 390, referred to and followed.]—See DEFAMATION, 4.

*Nickle v. Douglas*, 37 U. C. R. 63, followed.]—See ASSESSMENT AND TAXES, 2.

*Omnium Securities Co. v. The Canada Fire and Marine Ins. Co.* 1 O. R. 494, observed upon.]—See FIRE INSURANCE, 3.

*Ontario Bank v. Kirby*, 16 C. P. 25 followed.]—See DIVISION COURTS, 2.

*Perdue v. Chinguacousy*, 25 U. C. R. 61, approved and followed.]—See MUNICIPAL CORPORATIONS, 3.

*Schrader v. Harnott*, 28 L. T. N. S. 702 followed.]—See BILLS OF



**EXCHANGE AND CHATTEL MORTGAGES, 2.**

*Sands v. Standard Insurance Co.*, 26 Gr. 113, 27, Gr. 167, approved.]  
See FIRE INSURANCE, 3.

*Smith v. Midland*, 4 O. R. 498, dissented from.]—See ASSESSMENT AND TAXES, 1.

*Wannamaker v. Green*, 10 O. R. 547, approved.]—See MUNICIPAL CORPORATIONS, 4.

*Wild's Case*, 6 Rep. 17, considered and followed.]—See WILL, 3.

*Wiltsie v. Ward*, 8 A. R. 549, approved.]—See DIVISION COURTS, 1.

*Wilson v. The Xantho*, 12 App. Cas 503, considered.]—See CARRIERS.

*Wood v. Dunn*, L. R. 2 Q. B. 13, considered.—See ATTACHMENT OF DEBTS.

*Yokham v. Hall*, 13 Gr. 235, followed.]—See ASSESSMENT AND TAXES 2.

**CHATTEL MORTGAGE.**

[RIGHT OF LIQUIDATOR TO OBJECT TO FORMAL DEFECTS IN.]

See BANKS AND BANKING.

**CHATTEL MORTGAGE TO SECURE INDORSER.**

See BILLS OF SALE AND CHATTEL MORTGAGES.

**COMMERCIAL TRAVELLER'S BAGGAGE.**

See CARRIERS.

**COMMON EMPLOYMENT.**

See NEGLIGENCE.

**COMPENSATION.**

See RAILWAYS, 1.

**COMPUTATION OF TIME.**

See MUNICIPAL CORPORATIONS.

**CONDITION.**

See FIRE INSURANCE.

**CONDITION LIMITING LIABILITY OF RAILWAY.**

See RAILWAYS, 2.

**CONDITION TO ABSTAIN FROM INTOXICATING LIQUORS AND CARD PLAYING.**

See WILL, 2.

**CONDITIONAL APPLICATION.**

[FOR INSURANCE.]

See LIFE INSURANCE.

**CONDITIONS OF CONTRACT.**

CONSTRUCTION OF.

See RAILWAYS, 4.

## CONSTITUTIONAL LAW.

In actions by assignees for creditors under 48 Vic. ch. 26 (O.), and amendments (now R. S. O. ch. 124) to impeach transactions as fraudulent and void, under that statute, the Court was evenly divided as to the constitutional validity of the Act.

*Per* HAGARTY, C. J. O., and OSLER, J. A.—The statute which is one of general application for the disposition of insolvent estates must be regarded as a whole and is *ultra vires* as being legislation on the subjects of bankruptcy and insolvency.

*Per* BURTON and PATTERSON, J. J. A.—The matters dealt with by the statute come clearly within the definition of "Property and civil rights in the Province."

*Per* BURTON and PATTERSON, J. J. A., also, (in *Clarkson v. The Ontario Bank*), sub-sec. 3 of sec. 3 of 48 Vic. ch. 26 (now repealed) did not vest in an assignee the right to maintain an action to recover back moneys paid by a person in insolvent circumstances within one month of an assignment by him under the Act.

*Per* BURTON, J. A. (in *Kennedy v. Freeman*), sec. 2 of 48 Vict. ch. 26 (now R. S. O. ch. 124, sec. 2), should be read as intended to invalidate any act fraudulent in the sense of being a violation of the statute if it has the effect of defeating or delaying creditors or giving one or more of them a preference over others.

*Semble, per* OSLER, J. A. (in the same case) the meaning of sec. 2 is, that when a person is in insolvent circumstances, if either the intent or the effect of the transaction is to prefer the creditor, that is all that is necessary to avoid it. *Clarkson v. The Ontario Bank*, 234; *Edgar v. The Central Bank of Canada*, 193; *Kennedy v. Freeman*, 216; *Hunter v. Drummond*, 166.

## CONTINGENT INTEREST.

*See* WILL, &C., 1.

## CONTRACT.

1. The defendant had agreed with the plaintiffs for the erection by them of a house on his land; and while engaged in such work the plaintiffs alleged unnecessary delays in their operations caused, as they said, by the neglect of the defendant in supplying material for the building and in the course of a discussion the defendant told the plaintiffs, "If you won't go on with your work, go away."

*Held*, that this did not amount to a rescinding of the agreement, and that plaintiffs were not warranted in treating the agreement as abandoned by the defendant, who was entitled to counter-claim against the plaintiffs for the increased cost to him of finishing the building.

*Midland R. W. Co. v. Ontario Rolling Mills Co.*, 10 A. R. 677, followed.

Decision of GALT, J., 14 O. R. reversed. *Clayton v. McConnell*, 560.

2. The defendant, at the request of the local agent of the plaintiff company, applied for a policy of insurance on his life, and submitted to the usual medical examination, at the same time telling the agent that he was not then prepared to pay the premium. By the application the defendant agreed to accept the policy when issued, and to pay the premium. The company accepted the application and sent the policy to the agent. It contained an express notice that until payment of the premium it would be considered void; and by

the rules of the company the agent had no authority to waive this condition. The agent called upon defendant with the policy, when he said he was still unable to pay the premium, but told him to let it lie, and he would attend to it in a little while. Three or four weeks after this, and without further communication with defendant, the agent forwarded the policy to him by mail.

The defendant took no notice of it, and the plaintiffs brought this action to recover the premium as due upon a completed contract of insurance and a policy duly issued.

The jury found that the defendant signed the application not intending to be used as an application, and on the representation by the agent that it would not be used without his consent.

The learned Judge of the County Court set aside the finding as being against evidence, and directed a new trial.

*Held, Per HAGARTY, C.J.O.*, that there being ample evidence to sustain the finding of the jury, and none to shew that the defendant had finally assented to or perfected the proposed insurance a new trial should not have been granted.

*Per BURTON and PATTERSON, JJ.A.*, the action failed because it was brought upon an executed contract, and there was no completed contract in fact, as it appeared by the plaintiffs' own declaration on the face of the policy that it was not to be operative until payment of the premium; and no waiver of that condition prior to or contemporaneously with the delivery to the defendant was proved.

Judgment of the County Court of York reversed. *Sun Life Assurance Co. v. Page*, 660.

## CONTRACT FOR BENEFIT OF THIRD PARTY,

*See FIRE INSURANCE, 1.*

## CONTRIBUTORY NEGLIGENCE.

*See NEGLIGENCE.*

## COSTS.

*See DIVISION COURTS, 1.*

## COURT OF REVISION, APPEAL FROM TO COUNTY JUDGE.

*See ASSESSMENT AND TAXES, 3, 4.*

## CREDITORS' RELIEF ACT.

1. Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor which were claimed by D., whereupon an interpleader summons was obtained by the sheriff which was argued before the Chief Justice of the Queen's Bench Division who made an order barring the claimant without any issue being directed. This order did not state that the parties consented to a summary disposal of the matter and the facts did not clearly appear. The sheriff proceeded and sold the property and made an entry under the Creditors' Relief Act. The appellants and several other creditors delivered certificates to the sheriff within the proper time who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him the County Court Judge gave the whole

fund to the plaintiffs under sub-section 4 section 3 of the Creditors' Relief Act. On appeal from such order to this Court the appeal was dismissed, the Court being equally divided.

*Per* BURTON and PATTERSON, JJ. A.—As there was a contest between the execution creditor and claimant and an adjudication in favor of the former the proceeding which took place upon the interpleader summons came within sub-sec. 4 sec. 3 of this Act, and entitled the plaintiffs to the whole proceeds of the property and the order appealed from was correct.

*Per* HAGARTY, C. J. O.—The circumstances of this case do not bring it within that section and the appeal should be allowed and the moneys distributed as if no interpleader proceedings had been taken.

*Per* OSLER, J. A.—The order disposing of the interpleader summons was not a proceeding under the Interpleader Act because it did not shew on its face the consent of parties to the summary disposition of the claim; but even if it was an interpleader proceeding it was not within the mischief of the Act which intended to provide only for the case where an issue has been directed. *The Bank of Hamilton v. Durrell*, 500.

2. One creditor cannot attack the judgment of another and object to his sharing pursuant to the Creditors' Relief Act in the distribution of moneys levied by the sheriff under executions in his hands, on the ground that the note on which such judgment was recovered was misdescribed, and the date of its maturity was mis-stated in the writ of summons, in order to obtain judgment earlier than could otherwise have

been done; the debtor not consenting or objecting to his recovery.

Where the debt is *bonâ fide* another creditor cannot object to the judgment merely because there was a defence which the debtor might have set up to the particular action.

Whatever power the Creditors' Relief Act may give to a creditor to contest the claim of another, it does not extend to the impeaching of a judgment by a summary proceeding before the County Judge.

Order complained of reversed. *Bowerman v. Phillips*, 679.

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## CRIMINAL LAW.

The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's Bench by *certiorari*, moved for a new trial, which was refused.

*Held*, that no appeal would lie to this Court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by *certiorari*, and tried on the civil side.

*Regina v. Eli*, 13 A. R. 526; *Regina v. Lalibertè*, 1. S. C. R. 117, referred to.

*Quære*, whether in any case of misdemeanor a new trial can now be granted, C. S. U. C. ch. 12, 112, 113—32 & 33 Vict. ch. 29, sec. 80 (D.) *Regina v. The Corporation of the City of London*, 414.

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## CROWN LANDS.

Plaintiff was a locatee of a free grant and homestead lot which at the time he located it, in May, 1887, was subject to a regulation of an



Order in Council of the 27th May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, &c. The patent in favor of plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals, and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the Order in Council.

*Held*, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the Order in Council.

*Semble*, that such regulations apply only before the issue of the patent to lands located under the Order in Council, and then only so far as rights of way, &c., are expressly conferred upon the licensee by the terms of his license.

Judgment of Q. B. D. affirmed.  
*Dunkin v. Cockburn*, 493.

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### DAMAGES.

*See* CONTRACT.

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### —, SETTING OFF INSURANCE AGAINST.

*See* NEGLIGENCE, 2.

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### —, DATE AT WHICH VALUE IS TO BE ASCERTAINED.

*See* RAILWAYS, 1.

### DEED OBTAINED BY THREATS OF LEGAL PROCEEDINGS.

*See* DURESS, 1.

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### DEFAMATION.

1. In an action for slander where the defence was that if the defendant had spoken the words (which he denied), the occasion was, a privileged one, there had been two trials, each resulting in a verdict for the plaintiff. The defendant moved for a new trial for misdirection by the learned Judge in (among other respects) not fully explaining to the jury that unless the plaintiff proved that the words were spoken with actual malice, he was not entitled to recover :

*Held*, [affirming the judgment of the Ch. D. 14 O. R. 275] that taking the charge as a whole, and without laying undue stress upon isolated expressions, the jury had been substantially told that the occasion was privileged; and that unless they were satisfied that defendant had abused the privilege, and availed himself of it to make the statement maliciously, they should find for the defendant.

In considering an objection for misdirection, the question is not whether every expression in a charge is perfectly accurate, but whether there is any reason to believe that a verdict, which is warranted by the evidence, has been caused or induced by any erroneous enunciation of the law by the Court.

*Per* PATTERSON, J. A.—The case was one for the application of Rule 311 (Consol. Rule 791) as, if there was any misdirection, it did not appear that substantial wrong or miscarriage had been caused by it.  
*Wells v. Lindop*, 695.

2. In an action against a mercantile agency company the alleged libel consisted of the publication among the general body of the defendants' subscribers of a notice or circular containing the words, after the plaintiff's name: "If interested inquire at the office." The defendants pleaded that the notice also contained words explanatory of the alleged libel, which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection, that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

*Held*, that there was a variance between the libel alleged and that proved, and that as the proposed amendment would have raised a new issue to which the evidence did not apply the plaintiff should have been nonsuited. *Todd v. Dun, Wiman & Co. and Chapman*, 85.

3. A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it, they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel consisting of the information

given by him to the company in answer to their request.

*Held*, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged, and there being no proof of express malice the plaintiff was not entitled to recover. *Ib.*

4. It is the occasion of publishing the alleged libel which constitutes the privilege. Where privilege exists implied malice is negatived, and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof, that the defendant knew that what he was stating was untrue, is not evidence of express malice.

*Semble*, per OSLER, J. A., a mercantile agency company have no higher privilege for their business publications than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged. *Todd v. Dun Wiman & Co., and Chapman*, 85.

*Clark v. Molyneux*, 3 Q. B. D. 235; *McIntee v. McCullough*, 2 E. & A. 390, referred to and followed. *Ib.*

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## DELEGATION OF POWER.

*See* POWER.

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## DEPOSIT RECEIPT.

*See* NEGLIGENCE, 3.

## DESCRIPTION OF PROPERTY SETTLED.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

## DEVIATION OF BOUNDARY ROAD.

See MUNICIPAL CORPORATIONS, 3.

## DEVIATION OF STREET.

See RAILWAY, 1.

## DISCRETION.

See PRACTICE.

## DISCRETION OF COUNCIL.

[TO OPEN ORIGINAL ROAD ALLOWANCE.]

See MUNICIPAL CORPORATIONS, 4.

## DISSOLUTION [OF PARTNERSHIP] BY CONSENT.

See PARTNERSHIP.

## DISTRESS FOR PAYMENT OF TAXES.

See ASSESSMENT AND TAXES, 1.

## DIVISION COURTS.

1. The defendant, for valuable consideration, executed a bond in favor of the plaintiff, conditioned for the payment of the principal and interest secured by a mortgage executed by

the plaintiff. The defendant having made default in payment of the interest for four years, the plaintiff was compelled to pay the arrears amounting in all, together with interest on the amount unpaid, to \$163, for the recovery of which he sued the defendant in the County Court when judgment was given for that sum, together with Division Court costs, against which the amount of the defendant's County Court costs was ordered to be set off.

*Held*, [reversing the judgment of the Court below] (1) that the debt or money demand arose from payment of the money by the plaintiff, and the amount of it was not ascertained by the signing of the bond. (2) that under the circumstances the Judge had no discretion to refuse the plaintiff, who had been successful in the litigation, his full County Court costs.

*Mitchell v. Vandusen*, 14 A. R. 517, considered and followed.

*Kinsey v. Roche*, 8 P. R. 515 ; *Wiltsie v. Ward*, 8 A. R. 549 ; *Forfar v. Climie*, 10 P. R. 90, approved. *McDermid v. McDermid*, 288.

2. The plaintiffs recovered judgment in the Division Court and issued an execution thereon under which nothing was made and which expired by lapse of time. At the request of the plaintiffs' solicitor the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their Division Court judgment in regular form and filed the same in the office of the clerk of the County Court and sued out a writ of *fi. fa.* goods in order to obtain the benefit of the provisions of the Creditors' Relief Act.

The respondent S., the holder of a warrant of execution in the Division Court, then moved to set aside the plaintiffs' proceedings and they were accordingly set aside by the County Court Judge on the ground that the judgment in the Court was void, being founded on a return to an expired execution.

*Held*, that a return of *nulla bona* where there were goods, was no more than an irregularity to be complained of by the defendant.

*Ontario Bank v. Kirby*, 16 C. P. 35, followed.

Nor could a third party object that such a return was made at the instance of the solicitor of the plaintiffs.

*Held*, also [reversing the judgment of the County Court] that a return of *nulla bona* could be properly made after the expiration of the writ and that the transcript and judgment in the County Court founded thereon were valid and regular. *Molsons Bank v. McMeekin. Ex parte Sloan*, 535.

3. In 1887, the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was *res judicata* by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover, because by suing in the Division Court, for the surplus of 1881 alone, they had divided their cause of action into two or more suits contrary to sec. 77 of the Division Court Act, R. S. O. 1887, ch. 51.

*Held*, [reversing the judgment of the County Court] (1) that the re-

covery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under sec. 77, or after abandonment of the excess under D. C. Rule No. 8, was no defence to an action for the surplus rates received by the defendants in the subsequent years: (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action.

*Semble*, that the several claims being entirely distinct and unconnected, did not form "cause of one action" so as to come within the prohibition of sec. 77 against dividing a cause of action. *Ib.*

*Re Ackroyd*, 1 Ex. 479, referred to.

The proper form of judgment in the Division Court when the excess is abandoned or the action is for balance of account pointed out. *The Public School Trustees of Section 9 Nottawasaga v. The Corporation of the Township of Nottawasaga*, 310.

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## DOUBLE ASSESSMENT.

See ASSESSMENT AND TAXES, 2.

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## DURESS.

1. The defendant had become liable as accommodation indorser for the husband of one of the plaintiffs who, with his wife became makers of a joint note to defendant as security, and which it was agreed should be paid out of the proceeds of certain lands that had been previously con-



veyed by the husband to his wife. Instead of doing so, however, the husband sold the lands, and absconded, leaving his wife behind.

The defendant, on learning this, went to the wife in a state of excitement, threatened to aid in proceedings criminal as well as civil unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter.

This, the mother, after persuasion by the daughter, agreed to give the defendant, he advising the plaintiff's legal adviser should not be consulted, and on the evening of the following day, a deed absolute in form, was executed by both the mother and daughter, the latter having dower in the land, in favor of the defendant, who, at the mother's request, gave a separate memorandum of defeazance. There had been no direct communication between the defendant and the mother; nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security.

In an action impeaching this deed as having been obtained by threats and undue influence, the trial Judge [ARMOUR, C.J.] dismissed the action with costs, which judgment was set aside by the Divisional Court of the Common Pleas Division.

On appeal to this Court, the judgment of the C. P. D. was reversed, and the judgment of the trial Judge restored with costs. *Sheard v. Laird*, 339.

2. The plaintiff being an agent for the defendants, an agricultural manufacturing company, sold to one S. a mowing machine for \$52, taking in exchange a horse, notwithstanding his instructions were to sell for cash only. The company, however,

adopted the sale by accepting from the plaintiff a chattel mortgage on the horse for their claim. Shortly afterwards the defendants becoming dissatisfied, C., their general agent, proposed to S. to return the mower and receive back the horse. This being agreed to, C. saw the plaintiff and informed him that he was authorized to take back the horse to S. and urged plaintiff to do so himself, or allow him (C.) to do so.

S. at first objected, but on being threatened "with an action," he consented, and lent C. a horse and buggy, and also a halter so as to lead the horse away. Subsequently, on the same day, the plaintiff, when informed that the horse had been returned to S., told C. that he had no right to take back the horse, alleging that he was worth \$95, for which sum he brought this action against the defendants.

At the trial the jury found that the horse had been taken away against the will of the plaintiff, and under a threat of criminal proceedings, and judgment was given in favour of the plaintiff for \$85, as being the value of the horse. The County Judge refused to set aside such judgment and findings.

*Held*, that there was no evidence of duress by threats, sufficient to avoid the plaintiff's consent to return the horse to S.

The law as to duress by threats of imprisonment considered.

Judgment of Court below reversed. *Piper v. Harris Manufacturing Co.*, 642.

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### DUTY OF RAILWAY COMPANY AS REGARDS ANIMALS TRESPASSING.

*See RAILWAYS*, 3.

**EQUITABLE EXECUTION.**

After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:

*Held*, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them, (otherwise than by paying it to the receiver), without leave of the Court. *Stuart v. Grough et al*, 299.

**EQUITABLE TITLE.**

See **BILLS OF SALE AND CHATTEL MORTGAGES**, 2.

**ESTOPPEL.**

H. Y., after having for some time carried on business as "The Hamilton Cotton Co." in partnership with the defendants, retired from the company and entered their employ as general manager, blank drafts, etc., signed by the company being placed in his hands for the financial purposes of the company. In June,

1883, H. Y., for his own purposes, drew in the name of the defendants on M. at Montreal for \$2,760, which was discounted by the plaintiffs, and the draft sent by them to Montreal for acceptance, the proceeds being first credited to defendants but subsequently to H. Y. The draft was duly honored by the drawee, and would have matured on the 28th of September. About a month before the maturing thereof H. Y. waited on the bank authorities, and requested them to recall the draft, alleging that the company were settling with the acceptor. On the same day the solicitor of the company obtained from H. Y. an order or letter addressed to the defendants, informing them of the fact of his having so used a draft made in their name, and requesting them to retire and charge the same to his account, and, as it had been discounted for his accommodation and proceeds applied to his own use, they (defendants) should not pay any part of it.

Shortly afterwards the defendants, separately, on distinct occasions, called at the bank, defendant L. asking to be shewn the draft, which was handed to and closely examined by him, and when asked why he was so critical in his examination answered that the "signature of J. M. Y. was usually not so shaky"; that he would call in a day or two and see if the draft was taken up. Defendant J. M. Y. on visiting the bank after examining the draft very carefully, when he was asked by one of the officers of the institution if he would send a cheque for it, answered that it was too late that day, but that he would send a cheque the following day.

No cheque was sent, however, and on or about the 13th of September the manager of the bank and the

bank solicitor called to see J. M. Y. and asked why the cheque had not been sent by him, when he admitted having promised to send the same; that at the time he had thought he would send it, and could not say why it had not been sent. He declined to say whether or not the signature to the draft was his. H. Y. subsequently left the country.

The trial Judge found that the draft was a forgery, but the judgment was reversed by the Divisional Court on the ground of estoppel by conduct on the part of the defendants.

*Held*, (reversing the judgment of the C. P. D., 13 O. R. 520), that the defendants were not estopped from setting up the defence of forgery.

*Held*, also, that the act of forgery in this transaction not being an act professing to have been done for or under the authority of the persons sought to be charged was incapable of ratification.

HAGARTY, C. J. O., dissenting.  
*Merchants Bank v. Lucas et al*, 573.

*See* NEGLIGENCE, 3.

## EVIDENCE.

In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant he swore at the trial that he never agreed to give such notes and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made and that when the writing was read over by the agent no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts, but the judge refused to permit such evidence to be given as fraud was not set up as

a defence; and also refused to allow an amendment setting up such defence by reason of which judgment was entered against defendant, which the Judge refused to set aside.

On appeal, this Court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, were of opinion it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial. The appeal was, therefore, allowed with costs, and a new trial ordered without costs. *McPherson v. Wilson*, 294.

## EXECUTION.

*See* CREDITOR'S RELIEF ACT.

## EXPRESS MALICE.

*See* DEFAMATION, 4.

## EXPROPRIATION.

*See* WAY.

## EXPULSION OF PARTNER.

*See* PARTNERSHIP.

## FIRE INSURANCE.

1. M., the plaintiff, held a mortgage on a steam tug owned by one G., who by arrangement with plaintiff, effected an insurance thereon for one year, the policy issued for which was not under seal and declared that "loss, if any, payable to M. as his interest may appear," and



further that the company were liable to pay to the insured and also to his assigns, if the policy should be assigned with the consent of the company, but not otherwise, all loss or damage, &c. The local agent of the company knew plaintiff was mortgagee, handed him the policy, and notified him of the time of its expiry near the close of the year, whereupon plaintiff paid the renewal premium for a year and took a receipt therefor in the name of G. signed by the general agent.

During the currency of that year the tug was burned and the company refusing to pay plaintiff the insurance, he sued therefor in his own name. The Queen's Bench Division held the action was properly constituted, and gave judgment in favor of plaintiff. On appeal that judgment was affirmed with costs, on the ground that the relation of trustee and cestui que trust had been created between G. and the plaintiff in respect of the policy moneys, [BURTON, J. A., dissenting].

One of the conditions of the policy was, that the company should not be liable for any loss occurring while petroleum, rock, earth, or coal oil, burning fluid, naphtha or any liquid product thereof or any of their constituent parts were stored or kept on the property insured.

*Held*, [affirming the judgment of the Court below], that the fact of there being a small quantity—about a gallon in two small cans—of lubricating oil, used for the purpose of oiling the machinery was not such a storing of oil, &c., as was contemplated by the condition. *Mitchell v. City of London Assurance Co.*, 262.

2. The defendants, in the prescribed manner, indorsed upon the plaintiff's policy as an addition to

the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for \$1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favor of his father. The omission was not explained, but it was not attributed to any fraudulent intent.

The defendants pleaded that the non-disclosure of the charge avoided the policy under the first statutory condition, or the above addition thereto.

The jury found that the existence of the annuity was not material to be made known to the defendants.

*Held*, affirming the judgment of the Q. B. D.: (1) that the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one because it was not limited to such facts or matters as were material to be made known to the company. (3) That the Divisional Court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial.

In the statutory declaration proving the claim under the policy the plaintiff said nothing of the annuity in favor of his father. Defendants



failed to prove, and the jury were not asked to find that the declaration was fraudulent in this respect.

*Held*, no defence under the 15th statutory condition.

*Semble*, the first statutory condition applies to matters of title or incumbrances, or relating to the "moral" as well as the "physical" risk where the policy is based upon an application in which the insured is interrogated as to such matters.

*Klein v. The Union Fire Ins. Co.*, 3 O. R., 234, approved and distinguished.

On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and tenants as a dwelling house, thereby contracting with the defendants that it was so occupied; whereas in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance the risk never attached. On the pleadings and at the trial this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and that the application for the substituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked for, and had told him that the building was then unoccupied.

*Held*, that under the circumstances the knowledge of their general manager was the knowledge of the company; that the misdescription was

immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground, and set it up as a warranty or part of the contract. *Reddick v. Sarageen Mutual Fire Insurance Co.*, 363.

3. The right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause referred to below, depends upon whether they have a good defence against the claim of the mortgagor, who as between himself and the insurance company is the party insured.

The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided.

*Held*, that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition. *Sands v. Standard Ins. Co.*, 26 Gr. 113, 27 Gr. 127, approved.

*Held*, also, that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the condition.

After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objection to them for many months after, and gave no notice that any further proofs were required. When making payment of the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognise any claim on the policy by

the mortgagor, by reason of non-compliance with the statutory condition as to proof of loss.

*Held*, that they must be taken to have dealt with the mortgagees as agents of the mortgagor, and that they had waived further proofs of loss; and that the payment enured to the benefit of the latter.

Judgment of the Court below affirmed. *Bull v. The North British Canadian Investment Co. and The Imperial Fire Ins. Co.*, 421.

[Affirmed by Supreme Court 29th June, 1889.]

## FORGERY.

*See* ESTOPPEL.

## FRAUD.

*See* NEGLIGENCE—EVIDENCE.

## FRAUDULENT PREFERENCE.

1. One Chamberlain being in insolvent circumstances, and indebted to K. in \$120, was pressed by him for payment when he agreed to sell K. a horse for \$110, in part payment; and about the 15th of August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st of October, Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 Vict. ch. 26 (O.) respecting assignments for the benefit of creditors, which came

into force on the 1st September, 1885.

In an action against K. to recover the horse on the ground of fraudulent preference,

*Held*, affirming the judgment of the Court below, that the sale having been made before the Act came into force, the provisions thereof did not apply.

*Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed.

*Held*, also, that the sale was not void, either as a fraudulent preference under R. S. O. ch. 118, or for non-compliance with the Bills of Sale Act. *Coats v. Kelly*, 81.

2. A man may be deemed in "insolvent circumstances," within the meaning of 48 Vict. ch. 26, sec. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent,

*Held*, also, [affirming the judgment of the Ch. D., 14 O. R. 288], that book debts are a species of property covered by sec. 2 of the 48 Vict. ch. 26 (O.), and that any gift, conveyance, assignment, transfer or delivery thereof by a debtor in insolvent circumstances is void.

BURTON, J.A., dissenting on this point. *Warnock v. Klöpfer*, 324.

3. The defendant who was employed as financial manager of a firm advanced to them a large sum of money to be repaid on his giving six months notice demanding payment, on default of which the firm covenanted to assign certain securities. This notice was given on 15th January 1885, but although repeated demands for payment were made by defendant nothing was done until 19th

December, 1885, when a transfer to him of certain securities was made by the firm who within two months made an assignment under 48 Vict. ch. 26 (O.) which came into force on 1st September, 1885.

In an action by the assignee under that statute to recover back the amount realized from the securities, it was

*Held*, that whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law.

Whether the effect of the statute is to alter the law in this respect, *Quære*. *Clarkson v. Sterling*, 234.

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### FREE GRANT AND HOMESTEADS' ACT.

*See* CROWN LANDS.

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### FRESH MEAT, SALE OF.

*See* MUNICIPAL CORPORATIONS, 3.

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### GOOD WILL.

*See* PARTNERSHIP.

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### HIGHWAY—BY-LAW TO ESTABLISH.

*See* MUNICIPAL CORPORATIONS, 4.

### HIGHWAYS.

*See* MUNICIPAL CORPORATIONS, 2, 4.—WAY.

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### HUSBAND AND WIFE.

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock in trade, and which the vendors sold to her upon her credit exclusively, and not to her husband.

*Held*, that even though the business might not be the business of the wife carried on by her separately from her husband, within the meaning of section 7, so as to protect the earnings from her husband's creditors, the goods so sold to the wife were her own property, under section 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors.

Whether this would be so with regard to goods purchased and to be paid for out of earnings of such a business: *Quære*.

Judgment of the C.P.D. affirmed. *Dominion Savings and Investment Society v. Kilroy*, 487.

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### IDENTITY OF PARCEL SOLD WITH THAT TAXED.

*See* ASSESSMENT AND TAXES, 2.

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### IMPEACHING TAX SALE, LIMITATION OF TIME FOR.

*See* ASSESSMENT AND TAXES, 1.



**INCOMPLETE INSTRUMENT.**

*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

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**INCREASE IN VALUE OWING TO RAILWAY ITSELF.**

*See* **RAILWAYS, 1.**

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**INDICTMENT FOR NUISANCE.**

*See* **CRIMINAL LAW.**

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**INJUNCTION.**

*See* **WAY.**

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**INSOLVENT CIRCUMSTANCES.**

*See* **FRAUDULENT PREFERENCE, 2.**

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**INSUFFICIENT FINDINGS OF JURY.**

*See* **JURY.**

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**INTEREST ABOVE LEGAL RATE.**

*See* **MORTGAGE, 1.**

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**AFTER MATURITY OF MORTGAGE.**

*Ib.*

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**ON MONEY PAID INTO COURT.**

*Ib.*

**INTEREST, CONTINGENT OR VESTED.**

*See* **WILL, 1.**

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**INTERPLEADER.**

*See* **BILLS OF SALE AND CHATTEL MORTGAGES — CREDITORS' RELIEF ACT.**

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**JUDGE'S CHARGE.**

*See* **DEFAMATION, 1.**

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**JURISDICTION.**

*See* **DIVISION COURTS.**

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**JURISDICTION TO ASSESS.**

*See* **ASSESSMENT AND TAXES, 3, 4.**

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**JURY.**

Judgment of the Chancery Division reversed, and judgment to be entered for plaintiff unless defendants elected to take a new trial. *St. Denis v. Baxter*, 387.

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**LIABILITY OF COUNTIES TO REPAIR BRIDGES IN BOUNDARY ROAD.**

*See* **MUNICIPAL CORPORATIONS, 1.**

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**LIBEL.**

*See* **DEFAMATION.**



**LIFE INSURANCE.**

*See* CONTRACT, 2.—NEGLIGENCE, 2.

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**LIMITATIONS STATUTE OF.**

*See* TRUSTEE AND CESTUI QUE TRUST.

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**LOSS PAYABLE TO ANOTHER.**

*See* FIRE INSURANCE, 1.

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**MAINTENANCE.**

*See* WILL, 1.

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**MANDAMUS.**

*See* MUNICIPAL CORPORATIONS, 2.

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**MARGIN, RIGHT TO RECOVER BACK.**

*See* BROKER.

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**MARRIAGE SETTLEMENT OF PERSONAL PROPERTY.**

*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2.

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**MARRIED WOMEN'S ACT.**

*See* HUSBAND AND WIFE.

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**MERCANTILE AGENCIES.**

*See* DEFAMATION, 2, 3.

**MEASURE OF DAMAGES.**

*See* NEGLIGENCE, 2.

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**MISDIRECTION NOT OCCASIONING SUBSTANTIAL MISCARRIAGE.**

*See* DEFAMATION, 1.

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**MISREPRESENTATION.**

*See* PAROL EVIDENCE.

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**MORAL RISK.**

*See* FIRE INSURANCE, 2.

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**MORTGAGE.**

1. By the terms of a mortgage in which the principal was payable by instalments interest was reserved at the rate of eight per cent. per annum "until payment in full."

*Held*, [affirming the judgment of Proudfoot, J.,] that these words related to the period fixed for the payment of principal and that interest was only recoverable after that time as damages and not by the terms of the contract, and that there was nothing in the circumstances of the case to justify the allowance of a greater rate than legal interest.

*Semble*, *Per* OSLER, J. A.—(1) *Primâ facie* the rate stipulated for in the contract up to the time certain may be adopted as a reasonable rate to be awarded as damages; (2) there is no distinction in principle in ascertaining interest to be awarded as redemption money, and interest to be awarded as damages.

During the progress of the action money had been paid into Court by the defendants which remained there on deposit for upwards of seven years :

*Held*, [also affirming the judgment below] that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and was not limited to the rate allowed by the Court on the deposit. *Powell v. Peck et al.*, 138.

[Followed in *Grant v. People's Loan*, Court of Appeal 10 Feb., 1890.]

2. Form of decree where mortgage rescinded after money advanced. *Superior Loan and Savings Co. v. Lucas*, 748.

See also FIRE INSURANCE.

## MUNICIPAL ACT.

See MUNICIPAL CORPORATIONS.

## MUNICIPAL CORPORATIONS.

1. By R.S.O. ch. 226, sec. 535, subsec. 2, it is the duty of the councils of adjoining counties to erect and maintain bridges over rivers forming or crossing the boundary line between the two counties ; and it is declared that a road which lies wholly or partly between two municipalities, shall be regarded as a boundary line, although it may deviate so that in some place or places it is wholly within one of the municipalities.

The boundary line between the counties of Victoria and Peterborough, in part of its course formerly passed between the 10th concession of the township of Verulam in the former, and the 19th

concession of the township of Harvey in the latter county, the lots in the latter concession from 1 to 15, being a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake. By 42 Vict. ch. 47, (O.), these lots were detached from the township of Harvey and annexed to the township of Verulam, from and after the 1st of March, 1880, for all municipal, judicial, electoral, and school purposes, and for the purpose of registration of titles, as fully as if the same had always formed part of that township ; and the remainder of the township of Harvey was entirely separated from the parts so detached for all purposes whatsoever.

*Held*, that by force of this Act and of the Territorial Act R. S. O. ch. 5, sec. 10, Verulam had become a township bordering on a lake, and that the boundary line between these two townships and consequently the county boundary line, in front of the range of lots so detached, was in the middle of Pigeon Lake, and no longer on the road allowance between such lots and the lots in the 10th concession of Verulam.

*Held*, also, [reversing the judgment of ROBERTSON, J.,] that the road on the former county boundary line, or on what might have been previously considered a deviation therefrom, was not a deviation within the meaning of sec. 535, from the road on the boundary line between the counties to the north of the range of lots transferred to the township of Verulam ; and, therefore, that the duty of maintaining a bridge over a river crossing the road on the former boundary line or deviation therefrom, and which was, wholly in the county of Victoria, was cast upon that county alone ; and that the ad-

joining county of Peterborough was not liable therefor.

The term "deviation" is used in the same sense in sections 535, (2), and 538. Its meaning considered, and the case of *Brant v. Waterloo*, 19 U. C. R. 450, approved. *The Corporation of the County of Victoria v. The Corporation of the County of Peterborough*, 617.

2. Municipal councils cannot be compelled by mandamus to open for travel an original road allowance.

Whether they will do so, is a matter which rests entirely in the discretion of the council.

Judgment of the Q. B. D. 12 O. R. 749, affirmed on this ground.

Secs. 524, 531 of the Municipal Act considered.

The general duty to repair imposed by the latter exists only in regard to travelled roads, and not to roads which have never been opened. Such duty can only be enforced by indictment,

*Moulton v. Haldimand*, 12 A. R. 503, on this point, referred to and followed. *Hislop v. The Township of McGillivray*, 687.

3. By section 503, sub sec. 6 of the Municipal Act of 1883 a corporation has power by by-law to prevent the sale of fresh meat in quantities less than a quarter carcase except by a person holding a license and in such place as the council may specify, and.

*Semble*, per OSLER, J. A.—The same construction would have been placed on the statute law as it stood before the Consolidated Act of 1883. *O'Meara v. City of Ottawa*. 75.

4. The Municipal Act, sec. 584, enacts that no council shall pass a by-law for establishing a public high-

way until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, &c.

The defendants on the 29th of July, 1887, published notices of their intention to pass a by-law on the 29th of August, 1887, to open a road across nine lots in the first concession of the township. On that day the council met and passed a by-law establishing a road across four only of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on shewing cause to the motion to quash the by-law.

Nothing had been done under the by-law.

*Held*, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last days, and, therefore, that a notice on the 29th of July of intention to pass a by-law on the 29th of August was insufficient.

Authorities as to computation of time in such a case considered.

*Laplante v. Peterborough*, 5 O. R. 634; *Wannamaker v. Green*, 10 O. R. 547, approved.

*Quære*, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice. *Re Ostrom and the Corporation of the Township of Sidney*, 372.

5. An action lies against a Municipal Corporation, where by the means of their works in grading their streets or otherwise, they cause water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper



care in performing the work, such injury might have been avoided.

The Corporation of Ottawa in the exercise of their right to make drains and ditches to carry off surface water from several streets in the neighbourhood of the plaintiff's property so negligently executed the work as to cause damage to the plaintiff by the overflow of the surface water upon his lands.

In an action brought therefor the learned Judge nonsuited the plaintiff. The nonsuit was subsequently set aside by order of the Divisional Court, costs of the first trial and of the order to be costs in the cause to the plaintiff in any event. On appeal to this Court the judgment of the Divisional Court was affirmed with costs. [BURTON, J. A., dissenting.]

*Per* BURTON, J. A.—There was no evidence of negligence, and on that ground the nonsuit should be upheld. *Derinzy v. Corporation of Ottawa*, 712.

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## MUTUAL INSURANCE COMPANY.

See ASSESSMENT AND TAXES, 3.

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## NEGLIGENCE.

1. While a car of the defendants in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they have the right of way, the plaintiff, whose carriage was waiting at the kerb stone, without observing the near approach of the car got into and drove her carriage

for a short distance in the same direction as the car, when she suddenly turned north intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in charge in turning his horse off the track, the horse would have collided with the plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and the plaintiff thrown to the ground, and her leg was fractured.

In an action for damages the jury found in favour of the plaintiff, which verdict the Divisional Court refused to disturb. On appeal this Court [OSLER, J. A., dissenting] being of opinion that there was no evidence of negligence on the part of the defendants, reversed the judgement of the Q. B. D., and dismissed the action with costs. *Follet v. Toronto Street Railway Company*, 336.

2. Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect, or default of another is, under the R. S. O. (1887), ch. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death, is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on viewing the whole question of pecuniary loss or gain in consequence of the death.

The deceased was a resident of Buffalo, N. Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in the Province; the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York.



*Held*, the grant of letters by the Surrogate Court of York was valid and effectual, and,

*Semble*, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked. [R. S. O. (1877), ch. 46.]

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company.

*Held*, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death.

*Held*, also, that the deceased was servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company. *Jennings v. The Grand Trunk R. W. Co.*, 477.

3. The plaintiff, a Norwegian by birth and almost totally ignorant of the English language, in September 1884, deposited with the defendants at one of their branch offices a sum of money and received from the bank the usual deposit receipt, at the time signing his name on the stub or counterfoil of the receipt for the purpose of enabling the bank to identify him at any time the money might be demanded. For the purpose of safe keeping, plaintiff, being about to proceed to work elsewhere, left the receipt with one S. S. About seven months afterwards plaintiff returned when he was informed by S. S. that he had withdrawn the money from the bank but promised to return it. The plaintiff being

ignorant of the manner in which the money had been paid out and of his rights as against the defendants took no steps whatever against them, and S. S. absconded from the country in August, 1885, heavily indebted. In the month of December following, the plaintiff having been informed as to his rights against the bank consulted a solicitor who undertook to attend to the matter, but omitted to take any steps, and in the month of April following (1886) the plaintiff through another solicitor made a demand on the bank for payment which was refused. The demand so made was the first notice the bank had of the fraud which had been practised on them.

*Held*, affirming the judgment of the Chancery Division (reported 14 O. R. 586) (1) that the plaintiff in entrusting the receipt to S. S. was not guilty of any act of negligence. (2) that his delay in notifying the defendants of the fraud perpetrated on them was not a breach of any legal duty on his part so as to estop him from recovering the amount of his deposit. *Saderquist v. Ontario Bank*, 609.

*See also* CARRIERS—RAILWAYS, 2.

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## NEW TRIAL.

*See* JURY.

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## NOTICE.

*See* NEGLIGENCE, 3.

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## NOTICE OF BY-LAW TO OPEN ROAD.

*See* MUNICIPAL CORPORATIONS, 4.

**NOVATION.**

*See* **BROKER—PRINCIPAL AND SURETY.**

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**OBSTRUCTION.**

*See* **WAY.**

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**ORIGINAL ROAD ALLOWANCE.**

*See* **MUNICIPAL CORPORATIONS, 2.**

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**OWNER'S RISK AGAINST ALL CASUALTIES.**

*See* **CARRIERS.**

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**PAROL EVIDENCE.**

*See* **EVIDENCE.**

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**PARTNERSHIP.**

J. H. M. entered into partnership with the defendants in the business of malsters and brewers, contributing the sum of \$14,071.80, as his share of the capital stock, and he and the defendant H. each paid to the defendant O'K. \$12,500 for his good-will in the business. One of the stipulations in the partnership articles was (No. 3) to the effect that any of the partners improperly dealing with the moneys or assets of the partnership should be liable to expulsion from the firm by a simple notice from the others or other of them to the effect that the partnership was at an end, in which case, by article 29, the partner so expelled should not have any claim for good-will in the partnership.

It was shewn that J. H. M., during the period that the partnership had been in existence (about seventeen months), had been in the habit of lending the funds of the firm to his friends, and otherwise improperly dealing therewith. No notice was, however, given expelling him from the firm by his partners. Instead of doing so, they verbally notified him that their partnership must cease, and then served him with a notice, which was duly published, that the partnership was dissolved by mutual consent.

J. H. M. at the same time executed a transfer of all his interest in the partnership business to his mother, the plaintiff, and she sued for the price paid by him to O'K. for the good-will.

The Common Pleas Division (CAMERON, C.J., dissenting) held the plaintiff entitled to recover the sum so paid; and an appeal from such finding was, owing to an equal division of the Judges of this Court, dismissed with costs.

HAGARTY, C. J. O., and OSLER, J. A., whilst agreeing with the other members of the Court that dissolution had not been effected by a notice of the expulsion of J. H. M. under the third clause, held that the most the plaintiff was entitled to was a reference to inquire what was the value of the good-will of J. H. M. in the partnership. *Mead v. O'Keefe*, 103.

[Reversed by Supreme Court]

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**PATENT.**

*See* **CROWN LANDS.**

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**PAYMENT OF TAXES.**

*See* **ASSESSMENT AND TAXES, 1, 2.**

**PERSONAL BAGGAGE.**

*See* CARRIERS.

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**PHYSICAL RISK.**

*See* FIRE INSURANCE, 2.

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**PLEADING.**

*See* DEFAMATION, 2. 3,

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**POSSESSION.**

*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

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**POWER OF APPOINTMENT.**

By a marriage settlement lands were conveyed to the use of the settlor, the mother of the intended husband, for life, and after her death in trust to pay the rents to the intended wife, and in case of her death before her husband, upon certain trusts in favor of the husband and the children of the marriage; but if he should die in her lifetime, then in trust for such persons as he by any deed with power of revocation and new appointment, or by his will should direct or appoint, and in default of appointment in trust for his right heirs.

Before the 1st of January, 1874, the husband pre-deceased his wife leaving no children. By his will he devised as follows:

"I give unto my wife all my real and personal estate whatever and wheresoever, to hold unto her and her heirs, &c., absolutely forever. I do also transfer unto her all the powers vested in me to bequeath,

convey, or execute by will or otherwise all or any of the properties conveyed to her under the settlement by Bathsheba Smith."

The settlor was then dead. The wife, assuming to execute the power contained in the settlement, by deed not containing a power of revocation appointed the lands to her own use absolutely, and then contracted to sell a part of them in fee.

Upon a case stated for the opinion of the Court, under the Vendor and Purchaser Act, as to whether a good title could be made to the purchaser, it was held by the Chancellor:

(1) That the power was executed by the will.

(2) That there was a valid delegation of the power to the wife by the will.

(3) That the deed executed by her was not a valid execution of the power, because not made with power of revocation and new appointment; and that the purchaser could not be compelled to accept the title because of the revocable character of any valid appointment by deed.

On appeal to this Court, *Held*, that the donee could not by his will delegate the execution of the power to his wife, and therefore that she could not, under any circumstances, make a valid appointment thereunder.

Judgment of the Chancellor (11 O. R. 191) affirmed on this ground. *Smith v. Chishome*, 738.

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**PRINCIPAL AND SURETY.**

The plaintiff indorsed an accommodation note of N. as collateral security for two mortgages on the real estate of N. in the hands of one R. amounting together to \$7,323.08. Subsequently B. entered into partnership with N., and R. agreed to de-

duct \$1,000 from his claim against N. on condition that B. became jointly liable for it. To effect this, R. for the expressed consideration of \$6,323.08 conveyed the mortgage property to B. and N. and they joined in executing a mortgage to R. for that amount payable in two years. In effecting this arrangement the accommodation note was not taken into account, and B. knew nothing of it. Within a year thereafter, B. and N. dissolved partnership, and, as between themselves, B. agreed to pay R's claim.

The plaintiff without any knowledge that B. had any connection with the matter paid the amount of the accommodation note to R. who gave credit to B. on a settlement of his indebtedness, for the amount so paid. On discovering the facts the plaintiff claimed from B. the amount so paid to R. on the ground that the plaintiff had so paid it as surety for a debt for which B. was liable and who received the benefit of such payment on the mortgage debt.

*Held*, (reversing the judgment of the Q. B. D.), that the money was paid to the use of N. not of B., and that plaintiff's highest right was to be subrogated to the rights of N. against B. and

*Semble*, the effect of the dealings between R. and B. and B. and N. was to discharge the plaintiff from all liability. *Purdum v. Nichol*, 244.

[Reversed on Appeal to the Supreme Court.]

See also DIVISION COURTS.

## PRIOR AGREEMENT TO GIVE SECURITY.

See FRAUDULENT PREFERENCE, 3.  
100—VOL. XV. A.R.

## PRIVILEGED COMMUNICATION.

See DEFAMATION, 3, 4.

## PROOFS OF LOSS.

See FIRE INSURANCE, 3.

## PROPERTY AND CIVIL RIGHTS IN THE PROVINCE.

See CONSTITUTIONAL LAW.

## PUBLIC SCHOOLS.

In each of the years 1881 to 1886 inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, contending that they were entitled to retain and apply it towards payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under sec. 365 of the Municipal Act :

*Held*, [affirming the judgment of the County Court], that this section did not apply, and the money having been collected for school purposes the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools Act of 1885, 48 Vic. ch. 46 ; R.S.O. 1887, ch. 125, to alter the law in this respect. *The Public School*



*Trustees of Section 9, Nottawasaga v. The Corporation of the Township of Nottawasaga*, 310.

The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon. *The Public School Trustees of Section No. 9, Nottawasaga v. The Corporation of the Township of Nottawasaga*, 310.

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### QUALIFIED PRIVILEGE.

See DEFAMATION, 3, 4.

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### QUASHING BY-LAW.

See MUNICIPAL CORPORATIONS.

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### QUASHED ON GROUND OF DISCRETION.

The judgment of the Common Pleas Division (15 O. R. 544) affirmed on this ground. *O'Sullivan v. Lake*, 711.

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### RAILWAYS.

1. *Held*, affirming the judgment of FERGUSON, J., 12 O. R. 624, that in ascertaining the compensation to be made to a landowner for land expropriated for a railway under R. S. C. ch. 109, sec. 8, the value of the part taken (as well as the increased value of the part not taken, which by sub-sec. 21 is to be set off) must be ascertained with reference to the date of the deposit of the map or plan and book of reference, under sub-sec. 14, (or in this case with reference to the date of the notice or

determination to expropriate) and therefore such value should include an increase which may have been caused by, or is owing to, the contemplated construction of the railway.

*Semble*, per BURTON, J. A., that what is intended by sub-sec. 21 is a direct or peculiar benefit accruing to the particular land in question and not the general benefit to all landowners resulting from the construction of the railway.

*Semble*, per OSLER, J. A. The land in question not having been taken for the purpose of the railway strictly, but, after the same had been laid down, for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway. *James v. The Ontario and Quebec R. W. Co.*, 1.

2. An action to recover damages for the loss of goods consigned to be carried by the defendants from Toronto to McGregor Station, on the C. P. Railway in Manitoba, and for injury sustained by other goods from water and from delay in transport. The line of the defendants' road extended as far as Fort Gratiot, Michigan, and the goods were carried the rest of the way by other companies, and were damaged by the negligence of one or more of such companies.

The defendants sought to protect themselves from liability by setting up the 10th condition indorsed on the receipt given to the plaintiff for the amount paid by him for carriage, which was as follows: "Goods addressed to consignees at points beyond the places at which the company has stations, and respecting

which no directions to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them ; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance ; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention occurring after the said goods arrive at said stations, or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

*Held*, that the contract of the defendants was to carry the goods to McGregor Station ; and in its true construction, the 10th condition applied only to the forwarding of the goods to the place to which the defendants had contracted to carry them, whether that was a place on the line of the defendants' or a connecting railway, and had not the effect of limiting the liability of the defendants to matters occurring on their own line only.

*Collins v. Bristol and Exeter R. W. Co.*, 7 H. L. Cases, 194, followed.

*Held*, also, that the provisions of the Railway Act, R.S.C. ch. 109, sec. 104, which preclude a railway company from relieving themselves from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of its servants, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the Parliament of Canada.

The judgment of the Q. B. D. (12 O. R. 103) affirmed, but on different grounds. *McMillan v. The Grand Trunk Railway Company*, 14.

3. By the negligence of the plaintiff's servants, his horses escaped upon the defendants' line of road at a farm crossing, not far from an open overhead bridge on the track. Some of them were astray upon the track. While being driven back towards the crossing by the persons in charge, a train approached, which drew up for a time, the rear cars being on the crossing, and then the track being clear the engine driver sounded the whistle for brakes off, and proceeded. The horses, or some of them, had then come nearly abreast of the engine, but, alarmed by the whistle and motion of the train, they turned and ran on towards the bridge. They got upon the bridge before they could be stopped, and some had their legs broken by getting them between the ties, and others jumped over the sides and were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was no evidence that the engineer had acted recklessly or wantonly in proceeding with the train.

*Held*, (reversing the judgment of the Queen's Bench Division), that the defendants were not liable; there

was no evidence of negligence in the manner in which the train was started; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engineer to wait until the horses had been entirely driven off their premises.

*Auger v. The Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165, considered.

*Campbell v. The Great Western R. W. Co.*, 15 U. C. R. 498, observed upon and distinguished. *Hurd v. The Grand Trunk R. W. Co.*, 58.

4. The plaintiff, with her father and brother, went some hours before the departure of the train on which she was a passenger, to a ticket office of the defendants in O., in order to procure a ticket to W. and return. The only kind of return ticket issued on the route, by the defendants, was called a land-seeker's ticket, for which thirty dollars less than the fare each way separately was charged. These tickets were not transferrable, and were subject to a number of conditions printed on them, among which was one limiting the baggage liability to wearing apparel not exceeding one hundred dollars in value; and another condition required the signature of the passenger to the ticket for the purpose of identification and to prevent its transfer. The plaintiff's brother purchased the ticket for her, and at his request the time for using it was extended beyond the time limited by the ticket. The defendants' agent then asked for and obtained plaintiff's signature to the ticket, by which she agreed, in consideration of the reduced rate, to all its provisions, explaining to her that it was for the purpose of identification. The plaintiff did not read the ticket,

having sore eyes at the time, and the agent did not read or explain the conditions to her further than that she alone could use it.

On the trip to W., an accident happened to the road-bed of the defendants' railway by reason of which the train was overturned, and the plaintiff's baggage, valued at over one thousand dollars, was destroyed fire. The railway had been constructed by the government and transferred to defendants. There were no indications before the accident of any defect in the road-bed.

In an action for damages for such loss the jury found a verdict for the full amount of the alleged value, which on application to the Divisional Court was set aside, [ROSE, J., dissenting,] and the action dismissed with costs. On appeal to this Court it was

*Held*, [by the majority of the Court,] affirming the judgment of the Court below, that there was no evidence of any negligence with which the defendants were chargeable.

*Held*, also, [BURTON, J.A., dissenting,] that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage.

*Per* BURTON, J.A.—The delivery of the ticket with any condition, by itself amounted only to a proposal to carry on certain terms, and until brought to the notice of the party intended to be bound was not a contract. *Bate v. The Canadian Pacific Railway*, 388.

[Reversed by Supreme Court, 29th June, 1889.]



**RECEIVER.**

The effect of the appointment of a receiver upon the rights of an attaching creditor considered.

*Hawkins v. Gathercole*, 1 Drew. 12; *Ames v. Birkenhead Dock Co.*, 20 Beav. 322, acted on. *Stuart v. Grough*, 299.

**RECTIFICATION OR RESCIS-  
SION.**

See **BILLS OF EXCHANGE AND PROMISSORY NOTES—MORTGAGE**, 2.

**RELATION BACK TO PRIOR  
AGREEMENT.**

See **FRAUDULENT PREFERENCE**.

**RES JUDICATA.**

See **DIVISION COURTS**.

**RENEWALS.**

See **BILLS OF SALE AND CHATTEL MORTGAGES**, 1.

**RESCISSION OR ABANDONMENT  
OF CONTRACT.**

See **CONTRACT**, 1.

**RESERVATION BY ORDER IN  
COUNCIL.**

See **CROWN LANDS**.

**RESIDENT AND NON-RESIDENT  
ROLL.**

See **ASSESSMENT AND TAXES**, 1, 2.

**RESTRAINT ON ALIENATION.**

See **WILL**, 3.

**RETURN OF NULLA BONA  
AFTER EXPIRATION OF WRIT.**

See **DIVISION COURTS**, 2.

**RETURN TICKET AT REDUCED  
RATE.**

See **RAILWAYS**, 4.

**RIGHT OF SUBSEQUENT EXECU-  
TION CREDITORS TO PARTICI-  
PATE IN PROCEEDS OF EXECU-  
TION.**

See **CREDITORS' RELIEF ACT**.

**RIGHT TO DISPUTE VALIDITY  
OF ASSESSMENT IN ACTION.**

See **ASSESSMENT AND TAXES**, 4.

**RIGHT TO SUE.**

See **FIRE INSURANCE**, 1.

**RISK, MORAL OR PHYSICAL.**

See **FIRE INSURANCE**, 2.

**ROLL—RESIDENT AND NON-  
RESIDENT.**

See **ASSESSMENT AND TAXES**, 1, 2.



**SALE BY BANK.**

[OF CHATTELS MORTGAGED.]

*See* BANKS AND BANKING.**SALE OF LAND FOR TAXES.***See* ASSESSMENT AND TAXES, 2.**SALE OF FRESH MEAT.***See* MUNICIPAL CORPORATIONS, 1.**SHIPMENT OF GOODS TO A  
POINT BEYOND LINE OF RAIL-  
WAY.***See* RAILWAY COMPANY, 2.**SCHOOL TRUSTEES.***See* PUBLIC SCHOOLS.**SLANDER.***See* DEFAMATION.**SOLICITOR.**

*Held*, affirming the judgment of the Q. B. D. [BURTON, J. A., dissenting], that a duly admitted and enrolled solicitor, who does not take out his annual certificate, as such, cannot allow his name to be used in legal proceedings as partner by a firm of practising solicitors even though he does not derive any emolument therefrom, without rendering himself liable to the fines and penalties imposed by R. S. O. ch. 140, secs. 20, 21. *In re MacDougall*, 150.

**SPECIAL CONTRACT.***See* CARRIERS.**SPLITTING CAUSE OF ACTION.***See* DIVISION COURTS, 3.**STATUTES.**British North America Act sec. 91.]—  
*See* CONSTITUTIONAL LAW.C. S. U. C. chs. 13, 112, 113.]—*See*  
CRIMINAL LAW.32 and 33 Vict. ch. 20 sec. 80 (D.)—  
*See* CRIMINAL LAW.37 Vict. ch. 25 sec. 2 (C.)—*See* CAR-  
RIERS.42 Vict. ch. 47, (O.)—*See* MUNICIPAL  
CORPORATIONS.48 Vict. ch. 26 (O.)—*See* FRAUDULENT  
PREFERENCE.R. S. C. ch. 109.]—*See* RAILWAYS, &c.R. S. O. ch. 46.]—*See* NEGLIGENCE, 2.R. S. O. ch. 50.]—*See* NEGLIGENCE.R. S. O. ch. 51, secs. 70, 220, 223, 224,  
226.]—*See* DIVISION COURTS.R. S. O. ch. 125, secs. 5, 7.]—*See* HUS-  
BAND AND WIFE.R. S. O. ch. 135.]—*See* NEGLIGENCE, 2.R. S. O. ch. 140.]—*See* SOLICITOR.R. S. O. ch. 180, secs. 137, 155.]—*See*  
ASSESSMENT AND TAXES, 1.R. S. O. ch. 184, sec. 546.]—*See* MUNI-  
CIPAL CORPORATIONS.R. S. O. 1887, ch. 24.]—*See* CROWN  
LANDS.R. S. O. (1887) ch. 47 secs. 163, 165,  
166, 168, 221.]—*See* DIVISION COURTS.

R. S. O. (1887) ch. 65.]—*See* CREDITORS' RELIEF ACT.

R. S. O. (1887) ch. 180 secs. 114, 129, 130, 131, 155, 156.]—*See* ASSESSMENT AND TAXES.

R. S. O. (1887) ch. 193, secs. 34, 35.]—*See* ASSESSMENT AND TAXES.

Municipal Act, 1883, sec. 503, sub-sec. 6.—*See* MUNICIPAL CORPORATIONS, 3.

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### STATUTE LABOUR.

*See* ASSESSMENT AND TAXES—WAY.

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### STATUTE OF LIMITATIONS.

*See* TRUSTEE AND CESTUI QUE TRUST.

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### STATUTORY CONDITIONS.

*See* FIRE INSURANCE, 2.

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### STREET, CAR DAMAGE BY.

*See* NEGLIGENCE, 1.

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### STREET, DEVIATION OF.

*See* RAILWAY, 1.

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### STREET RAILWAYS.

In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the City of Toronto, in which they agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober and civil agents, conduct-

ors and drivers to take charge of the cars upon the said railways, and that they and their agents, conductors, drivers, and servants would at all times \* \* operate the said railway, and cause the same to be worked under such regulations as the common council of the City of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privileges granted by the agreement. Subsequently the privileges so conferred upon those persons were assigned to the defendants who continued to work several railways, and after some years introduced for use thereon smaller cars, drawn by one instead of two horses as had been done previously, and with only one man in charge instead of two, as on the larger cars.

In 1852 the council of the city passed a by-law (No. 1264), prohibiting the operation of any cars within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief.

*Held*, [reversing the judgment of the Court below], OSLER, J. A., dissenting. (1.) That the by-law in question was not within the terms of the agreement, and that it was therefore *ultra vires*. (2.) That the by-law was also invalid as it was an invasion of the domestic concerns of the company. *The Corporation of the City of Toronto v. The Toronto Street Railway Company*, 30.

*See also* NEGLIGENCE, 1.

**SUBROGATION.**

*See* PRINCIPAL AND SURETY.

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**SUBROGATION CLAUSE.**

*See* FIRE INSURANCE, 3.

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**SUBSEQUENT EXECUTION  
CREDITORS.**

*See* CREDITORS' RELIEF ACT.

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**SURFACE WATER.**

*See* MUNICIPAL CORPORATIONS, 5.

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**SURROGATE COURT, EFFECT  
OF GRANT BY.**

*See* NEGLIGENCE, 2.

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**TAX SALE.**

*See* ASSESSMENT AND TAXES, 1, 2, 3.

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**, INVALIDITY OF.**

*See* ASSESSMENT AND TAXES, 1, 2.

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**TERRITORIAL ACT R. S. O. CH. 5.**

*See* MUNICIPAL CORPORATIONS, 1.

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**THIRD PARTY ATTACKING  
JUDGMENT OF ANOTHER.**

*See* CREDITORS' RELIEF ACT, 2.

**THIRD PARTY MOVING TO SET  
ASIDE JUDGMENT.**

*See* DIVISION COURTS, 2.

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**THIRD TRIAL.**

*See* DEFAMATION, 1.

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**TIME, COMPUTATION OF.**

*See* MUNICIPAL CORPORATIONS, 4.

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**TITLE.**

*See* FIRE INSURANCE, 2.

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**TOWNSHIP FRONTING ON  
LAKE.**

*See* MUNICIPAL CORPORATIONS, 1.

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**TRANSCRIPT OF JUDGMENT TO  
COUNTY COURT.**

*See* DIVISION COURTS, 2.

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**TRESPASS.**

*See* CROWN LANDS.

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**TROVER.**

*See* DURESS, 2.

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**TRUSTEE AND CESTUI QUE  
TRUST.**

In 1877, defendant B., who was engaged in a general business collecting and investing money, having become aware that plaintiff held

some promissory notes of one F. for whom B. was effecting a loan, suggested that plaintiff should hand over the notes to him as money was going through his hands for F. and that he would collect them and save the amount for herself and children. Plaintiff having acted on such suggestion and the money having been received by B. in that year was retained by him until 1886 when he became insolvent and made an assignment under the Act to trustees, who in distributing the assets refused to recognise the plaintiff's claim, and pleaded the statute of limitations to an action brought to enforce payment.

*Held*, reversing the judgment of the Chancery Division (13 O. R. 173) that the transaction created the relation of trustee and cestui que trust between the plaintiff and B., and that the right to recover from B.'s estate was not barred by the lapse of time. *Coyne v. Broddy et al.*, 159.

### ULTRA VIRES.

*See* STREET RAILWAYS.

### UNCERTIFICATED SOLICITOR.

[ALLOWING HIS NAME TO BE USED.]

*See* SOLICITOR.

### UNDUE INFLUENCE.

*See* DURESS, 1.

### VALIDITY OF CONDITIONS.

*See* WILL, 2.

### VARIANCE.

*See* DEFAMATION, 2.

### VENDOR AND PURCHASER.

*See* POWER OF APPOINTMENT.

### VESTED INTEREST.

*See* WILL, 1.

### WAIVER.

*See* FIRE INSURANCE, 3.

### WAIVER OF CONDITION.

[AS TO PAYMENT OF PREMIUM.]

*See* CONTRACT, 2.

### WAY.

It is essential to the validity of a by-law to expropriate land for the purpose of establishing and laying out a highway, that the course, boundary, and width of such highway should be capable of being ascertained from the by-law itself or from some document or description referred to by it, which may be treated as incorporated therewith; failing this the by-law is necessarily inoperative and void.

In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs: and where the road in question, the land for which had not been expropriated,



was described as being "A road on the boundary between the 11th and 12th concessions of the said township from the line between lot No. 30 and lot No. 31, to the line between lot No. 35 and lot No. 36," no survey or other description of the road being referred to in the by-law passed for the purpose of opening up the same, and no sufficient evidence having been given of the performance of statute labour on the line of road, it was

*Held*, [affirming the judgment of the C. P. D. 12 O. R. 297] that the plaintiffs had failed in shewing that the road as claimed by them had been duly established as a public highway.

*Semble*, the land for a road not having been expropriated the mere expenditure of public money in opening it, and the performance of statute labor upon it, does not make it a highway.

An action for an injunction may be maintained by a municipality to restrain the obstruction of a highway. They are not confined to the remedy by indictment; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4, approved of. *St. Vincent v. Greenfield*, 567.

## WIFE'S SEPARATE PROPERTY.

See HUSBAND AND WIFE.

## WILL, CONSTRUCTION OF.

1. The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided amongst the said four

children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent." The will also directed the said four children should be maintained and educated out of the income of such property during their minority, and the surplus to be invested during such their minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one to divide the personal estate share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, &c. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands.

*Held*, (1) [affirming the judgment of the Court below], that one of the sons, who had attained twenty-one, was not entitled to maintenance out of the estate.

*Held*, (2) [varying the same judgment], that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue. *Ryan v. Cooley*, 379.

2. A testator devised to his wife for life the south half of lot 6, and then as follows: "I give and devise to my son Michael, after the death of his mother, the use of the said south half lot 6, subject to the following conditions: (1) That he totally abstain from intoxicating

liquors and card playing \* \* ten years after the death of his mother, should he fulfil these above mentioned conditions, I give and devise to him to hold to his heirs and assigns forever the said lot. Should my said son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime; but I will and bequeath the said half lot 6 to my grandson James Dunn, to hold to his heirs and assigns forever."

Michael died in 1886, five years after the testator's widow. He had not been a total abstainer at any time after his father's death, which took place in 1872. On the contrary, it was shewn he had been an habitual drinker.

*Held*, affirming the judgment of the Queen's Bench Division (13 O. R. 267) that the condition was valid in law; that it had been broken, and that in consequence the devise in favour of the testator's grandson took effect.

Such a condition could not fairly be interpreted to preclude the use of intoxicants for *bona fide* medicinal purposes. *Jordan v. Dunn*, 744.

3. By her will the testatrix devised as follows: "*I give and devise to my beloved children A. P. [her son] and M. P. [his wife] and to their children and children's children forever all and singular lot 15 \* \* Provided always, that the aforesaid A. P. or M. P. shall not be at liberty at any time or for any purpose to convey or dispose of [said lot] as it is my will that the same be entailed for the benefit of their children.*"

The residue of her estate the testatrix devised to her daughter-in-law the said M. P.

*Held*, that upon the true construction of the will A. P. and M. P. took only an estate by entireties for their lives and the life of the survivor of them.

*Held*, also that they did not take an ultimate remainder in fee, expectant on any estate tail given to the children, and that under 48 Vict. ch. 13, sec. 5, (R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5) it was the duty of the Court to make a declaratory decree as to this in order to answer as to the whole estate taken by the parents.

*Held*, also, that a mortgage by A. P. and M. P. was valid, and bound their life estate in the land, notwithstanding the attempted restraint on alienation.

*Semble*, that the children took an estate tail, but the special case which was stated for the opinion of the Court, did not require this to be declared.

The judgment of the Q. B. D. affirmed with a variation. *Peterborough Real Estate Co. v. Patterson*, 751.

*See*, also, POWER OF APPOINTMENT.

## WRITTEN AGREEMENT.

*See* EVIDENCE.

## YONGE STREET.

The macadamized toll road known as Yonge street, formerly a provincial public work, was, in 1855, by Act of the Legislature and order in Council, vested in and acquired by the county of York. The order in Council described it as "the macadamized toll road running northerly

from the liberties of the city of Toronto to the village of St. Albans (Holland Landing), known as Yonge street or the North Toronto Road to Holland Landing," etc.

One of the conditions of sale was, that the road should be kept in thorough repair by the county.

The roadway intended for and used by travellers was a macadamised road of the width of 30 feet, and was not in any way out of repair, and was at the place where an accident occurred in all respects exactly as it was when transferred by the Government to the county.

The plaintiff, when turning out of a side road, in order to reach an hotel which stood near the side of Yonge street, drove along part of the original allowance for road on which the toll road was constructed, but which had never been opened for travel by the defendants, and was used merely as an approach to this hotel. In doing so, the night

being dark, the plaintiff missed the way leading to the hotel, ran against some obstruction, and was, with his buggy, thrown down a cutting or embankment into the toll road and was injured.

*Held*, (reversing the judgment of the Court below) that there was no evidence of negligence, and that the defendants were not liable. The plaintiff had not been invited to use the travelled way to the hotel as part of the toll road, and the accident had not happened on any part of the toll road, or in consequence of that road being out of repair. *Steele v. York*, 666.

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**YORK, THE LIABILITY OF THE  
COUNTY OF—FOR ACCIDENTS  
NOT OCCURRING ON THE MA-  
CADAMIZED TOLL ROAD.**

*See YONGE STREET.*

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